SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 166.

THE UNITED STATES, APPELLANT,

vs.

DIXON N. GARLINGER.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

1 In the Court of Claims. Term 1895–1896.

DIXON N. GARLINGER
v.
THE UNITED STATES. } No. 16312.

I.—*Petition.*

On the 24th day of August, 1888, the claimant filed a preliminary petition, and on the 11th day of May, 1892, he filed his completed petition under the rules of this court.

His amended petition was filed by leave of court, January 29, 1895, and is as follows, to wit:

Amended petition, filed January 29, 1895.

To the Honorable, the Court of Claims:

Your petitioner, Dixon N. Garlinger, a citizen of the United States, residing at Washington, in the District of Columbia, respectfully represents:

That in the year 1882, he was appointed a night inspector in the customs service of the United States, at the port of Baltimore, in the State of Maryland; that he entered on the duties of said office on the 1st day of April, one thousand eight hundred and eighty-two (1882), and continued to discharge the same until the 18th day of August, one thousand eight hundred and eighty-six (1886).

Petitioner says that during the said period of his service as a night inspector, compensation therefore was fixed by law at three dollars ($3) per diem, for services actually performed; that it was also provided by laws and regulations of the Treasury Department for the government of officers of customs under the superintendence and direction of sur-
2 veyors of ports, made by the Secretary of the Treasury, that the night inspectors shall be divided into two watches as nearly equal as possible, both watches to perform duty every night; that whenever it is necessary to assign a night inspector to a vessel, or to any other all-night charge, the night inspector so assigned must remain on the vessel until relieved, and he will be excused from performing any duty the following night.

Petitioner says that whilst holding the position of night inspector or night watchman he was required thirteen hundred and fifty-two times to perform double duty—that is, the duty of both the first and second watch, but that he was not only not excused from performing any duty the following night, but peremptorily required to perform such duty.

That whilst under orders he was required to perform the duties of a night inspector in both the first and second night watch, he has only been paid for one.

That by the laws and regulations for the government of officers of the customs, as prescribed by the Secretary of the Treasury, and as construed in the principal customs ports of the United States, one watch actually performed by a night inspector or night watchman is, and is regarded and paid for as, a day's work.

That under the law and regulations made in pursuance thereof, he is entitled to be paid three dollars ($3) per day for each day's work actually

performed, and that a day's work of a night inspector or watchman is the performance of one watch.

He therefore claims that he is entitled to be paid for thirteen
3 hundred and fifty-two days' service which he has performed under orders, and for which he has not been paid, at the rate of three dollars ($3) per day, amounting to four thousand and fifty-six dollars ($4,056), for which amount he prays judgment.

Your petitioner is the sole owner of this claim, and the only person interested therein, and no assignment or transfer of the claim or of any part or interest therein has been made, nor has any part or portion thereof been paid.

DIXON N. GARLINGER.

DISTRICT OF COLUMBIA, *ss:*

Dixon L. Garlinger, being duly sworn, deposes and says: I am the claimant in this cause; I have read the amended petition, and the matters therein stated are true, to the best of my knowledge and belief.

Subscribed and sworn to before me this 29th day of January, A. D. 1895.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

DUDLEY AND MICHENER,
Attorney for Claimant.

R. R. MCMAHON,
F. P. DEWEES,
Of Counsel.

4 II.—*Traverse, filed March 5, 1895.*

And now comes the Attorney-General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said amended petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

5 III.—*Judgment entered March 18, 1895.*

DIXON N. GARLINGER
v.
THE UNITED STATES. } 16312.

At a Court of Claims held in the city of Washington, on the 18th day of March, 1895, judgment for the claimant was ordered to be entered as follows:

The court on due consideration of the premises finds for the claimant, and orders, adjudges, and decrees that Dixon N. Garlinger do have and recover of and from the United States the sum of two thousand one hundred and eighty-four dollars ($2,184).

BY THE COURT.

6 IV.—*Motion of claimant to amend findings of fact and correct judgment.*

(Filed April 1, 1895. Allowed by the court November 25, 1895.)

Comes now the claimant, by his attorneys, and moves the court that the findings of fact as found by the court and judgment be amended as follows:

I.

Amend Finding II so that it shall read as follows:

"During the above-named period claimant was paid for 1,608 days of night service, of which 1,353 payments were for night service when he was present for duty, and 255 payments were for night service when he was absent from duty on leave or on account of absence."

(See report of Diffenbaugh, deputy collector, Record, page 67, near bottom of page.)

Our reasons for asking the foregoing amendment are that we think the court was led into an error by a misconception of the report of Collector Marine, Record, page 29, at the top of the page, where the claimant is credited with "number of nights present, 1,106; number of nights absent, 234." If we add 1,106 and 234 together, the total amount is 1,340 days, and this, taken from the 1,608 days paid for, leaves 268 days unaccounted for, for 1,608 minus 1,340 equals 268. This error of the court, for we believe it to be an error, may be accounted for by the fact that the statement of Collector Marine was for the period from May 1, 1871, to November, 1885, inclusive, as will be seen by an examination of the heading of that report, which reads as follows:

"Statement of service rendered by night inspectors of customs at the port of Baltimore, Maryland, during the period from May 1, 1871, to November 30, 1885, inclusive, as requested by Department letters of June 2 and 27, 1892."

7 (See Record, page 27, et seq.)

Now, if the court will examine the report of Diffenbaugh, the deputy collector (Record, page 67), it will be observed that he was undertaking to furnish the Secretary of the Treasury, and through that officer the Court of Claims, with the exact time of claimant's service, and he reports that the claimant "took oath of office and entered upon the discharge of the duties of a night inspector of customs on April 1, 1882, and continued in the same office until August 25, 1886, inclusive." This extends the period of the claimant's service beyond the time covered by the report of Collector Marine nearly nine months, or 268 days.

In addition to these things, we ask the court's attention to the fact that when the claimant was assigned to special service it was for both day and night service. (Record, page 12, cross interrogatories 24 and 28 inclusive.)

II.

The claimant also moves that Finding III be amended by striking out 1,106 and inserting 1,353; by striking out 234 and inserting 255, and by striking out 872 and inserting 1,098.

III.

The claimant also moves that Finding IV be amended by striking out 728 and inserting 954.

IV.

Claimant also moves that the conclusion of law be amended by striking out $2,184 and inserting $2,862.

Our reasons for the foregoing requests are:

8 First. Because there has been a miscalculation or misunderstanding of the evidence, as we have shown in the argument in support of our first motion, and which need not be repeated.

Second. In the opinion of the court, it is said: "On these 234 days the presumption is the claimant received what he was entitled to, and all that he was entitled to, viz, pay with absence from duty, and the reason that he was entitled to pay with absence from duty was that he had rendered double duty on 234 nights on the 1,106 nights in the other column." Applying this doctrine to the corrected statement of facts, we submit that the court should, upon the allowance of 1,353 nights, deduct 255 absences by reason of the fact that they were absences on leave or on account of sickness.

Therefore the claimant submits that the account stands as follows:

Amount of night service		1,353
Deduct those barred by statute	144	
Deduct absences on leave or sickness	255—	399
Balance of time entitled to		594

It is submitted that the claimant is therefore entitled to 954 days at $3 a day, or $2,862.00.

DUDLEY AND MICHENER,
Attorneys for Claimant.
F. P. DEWEES,
Of Counsel.

(Allowed November 25, 1 95, by the court.)

9 V.—*Motion of defendants for new trial.*

(Filed April 22, 1895. Overruled November 25, 1895.)

Now comes the defendant and move the court to set aside the judgment rendered in this case and grant a new trial therein, or render judgment for the defendant, for the reasons:

First. That defendant alleges that error of law was committed in the conclusion of the court that because claimant performed services in excess of those required by regulation of the Treasury Department for each day he was entitled to extra or additional compensation; and

Second. Because defendant alleges that wrong and injustice has been done the United States by said judgment in that no liability should be adjudged against the United States upon the facts found by the court.

J. E. DODGE,
Assistant Attorney-General.

(November 25, 1895, overruled by the court.)

10 VI.—*Amended findings of fact and conclusion of law. Filed November 25, 1895.*

The court, upon the evidence, finds the facts to be as follows:

I.

The claimant, a citizen of the United States, was appointed by the collector of the port of Baltimore a night inspector in the customs service at Baltimore in 1882. He took the oath of office and entered upon the discharge of the duties of night inspector of customs on April 1, 1882, and continued in office until August 25, 1886, a period of 1,608 days.

II.

During the above-named period the claimant was paid for 1,608 days, of which 1,353 payments were for night service when he was present rendering actual service, and 255 were for night service when he was absent and off duty.

III.

During the 1,353 days of night service the claimant was required to perform duty as night inspector from sunset to sunrise and until relieved by the day inspector, the length of the night service consequently varying, and sometimes extending from 5 p. m. of one day until 10 a. m. of the succeeding day. During this time the claimant was not allowed to be off duty on the succeeding night, after having been on duty two watches, except in the 255 instances set forth in Finding II, when he was off duty and received pay. That is to say, he performed the duties of both the first and second watch on 1,098 nights without additional compensation and without being allowed to be off duty on any alternate night.

IV.

The petition not having been filed until August 24, 1888, 144 days of the number last above stated are barred by the statute of limitations, leaving 954 days as the subject of the present suit.

V.

The claimant objected to his superior officer, the surveyor of the port, against his being required to perform the duties of both watches in one night without being excused from the performance of duty on the following night; and he subsequently remonstrated at various times.

11 VI.

At the time of his entering the service as night inspector he was furnished by his superior officers with a copy of the regulations promulgated by the Secretary of the Treasury for his governance and defining his duties. It was customary for the surveyor of the port to furnish such regulations to inspectors and others at the time of their entering the customs service. The regulations hereinafter quoted were among those so given to the claimant.

VII.

The Laws and Regulations for the Government of Officers of Customs under the Superintendence and Direction of Surveyor of Ports, 1877,

was issued by the Secretary of the Treasury to the custom-house authorities of all ports, including the port of Baltimore, and were in operation in all of the principal ports, except Baltimore, in which the practice of the ports at the time of the claimant's appointment was not, and had not been, in accordance with the requirement of the regulations making two night watches and relieving the first watch at midnight. There the surveyor of the port had always required the night inspectors to serve from sunset to sunrise.

VIII.

The following are among the regulations given to the claimant when he entered the service, above referred to:

"ART. 420. The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches.

"Whenever it is necessary to assign a night watchman to a vessel, or to any other 'all-night' charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night.

"Night watchmen must not quit their charge on being relieved without first making their presence personally known to the officer relieving them. Night watchmen, when on duty, must wear their official badge."

IX.

In the Laws and Regulations for the Government of Customs Inspectors, Weighers, Gaugers, and Measurers, etc., 1883, on pages 126, 127, there is the following:

"ART. 407. The lieutenants, if there be any, shall be on duty at such time and place as may be provided by the surveyor, to supervise the signing of the roll by the night inspectors as they report for duty; to assign to duty those who are present to the respective stations and charges; to make out a list of charges for the night inspectors of each watch; to note and report to the captain those night inspectors who report late, or who are absent from duty, and to obey such orders and perform such duties as may be required of them by the captain of the night inspectors. The lieutenant in charge shall remain on duty until sunrise, or such hour as shall be prescribed by the surveyor, and should any vessel arrive during the night, or any call be made for a night inspector, he will make the necessary assignment of a night inspector thereto.

"ART. 408. The report of each night (Cat. No. 916), showing the station or charge to which each night inspector reporting for duty was assigned, and also showing those who were late, absent, sick, etc., having been first signed by the captain and lieutenant on duty, shall be delivered to the surveyor.

12 "ART. 409. The night inspectors will be assigned to duty by the captain of the night inspectors in such manner and in accordance with such regulations as may be directed and prescribed by the surveyor of the port, and as, in his judgment, may be best for the prevention and detection of frauds on the revenue.

"Whenever it is necessary to assign a night inspector to a vessel, or to any other 'all-night' charge, the night inspector so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night.

"Night inspectors must not quit their charge on being relieved without first making their presence personally known to the officer relieving them.

"Night inspectors, when on duty, must wear their official uniform and badge, except when, by authority of the surveyor, the wearing of the uniform and badge, or either, is omitted for the purpose of more effectually preventing or detecting fraud."

Catalogue No. 916, referred to in article 408, is as follows:

CATALOGUE No. 916.

Night inspector's report for night ——, 188–. Reporting officer —— ——, captain of the night inspectors.

Names. From — p. m. to — p. m.	Where stationed.	Names. From — p. m. to — p. m.	Where stationed.

—— ——, *Captain.*

On page 166 of Laws and Regulations, etc., 1877, there is the following:

Night watchman's report for —— night, ——, 18—. Reporting officer, —— ——, captain of the watch.

Names.		Where stationed.		Officers' assignments.	
— o'clock — m p. m.	11½ o'clock p. m.	Vessel.	Wharf.	— o'clock — m p. m.	11½ o'clock p. m.

—— ——, *Captain.*
—— ——, *Lieutenant.*

To the SURVEYOR.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover $2,862.00

13 VII.—*Opinion of the court of March 18, 1895.*

NOTT, J., delivered the opinion of the court:

The law of master and servant has a certain elasticity not to be found in the law which regulates other contracts. The servant can not charge his employer if he works overhours within the sphere of his proper employment, and the master can not charge the servant with lost time where he falls short in his hours of labor. The remedy of the one is to discharge and of the other to stop work. So long as they allow the relation of master and servant to continue, so long trivial deviation from the right line of the contract will not receive the aid nor countenance of

the law. This element of elasticity was doubtless introduced into the law of master and servant for the peace and harmony of society. It is a wise rule, which enables both parties in a continuing relationship to know at any time just where they stand. If it were not so, the one might spring upon the other an account for short hours at the end of the year, and the other might present a bill for numberless unknown items of overtime, and endless petty conflicts would take the place of peace and harmony.

The law of master and servant goes still further than this. It requires (and this notwithstanding an express agreement or a statutory regulation) the servant to render service overhours in cases of emergency without additional compensation, and it even makes his refusal justifiable cause for discharge. That is to say, where a man agrees to work only ten hours a day and the master, in a proper case of emergency, requires him to work twelve, and he refuses, the master can treat the refusal as a violation of the contract and put an end to it.

But these cases of allowed deviation from the contract are nevertheless guarded by careful limitations. The additional service of the servant must be within the sphere of his ordinary employment. If required to do something entirely different from that which he was hired to do, he has a right of action. Thus, it is said, a clerk can not be required to carry mortar; a ladies' maid can not be required to milk cows; a saddler can not be required to cook; a farm laborer can not be required to serve as a household servant. So, if the servant renders additional service in the line of his own proper employment, but against his objection, and at the special request of the master, he can recover for it. So, too, his additional service, though not a good cause of action per se, will support a promise to pay, and he can recover on it.

These cases illustrate the care of the common law to guard the peace and quiet of the domestic relations, and to exclude the vexation of litigation from the ordinary daily affairs of life. But these variations from the letter of the contract all relate to trivial things. The law of master and servant does not compel a man who has agreed to render one kind of service to render another, nor one who has agreed to do one thing to do two. The departures from the contract which are countenanced must be trivial, ordinary, and reasonable, or rendered necessary by a miniature vis major termed "emergency."

14 If we regard the case before us as one of master and servant and the regulations of the Treasury Department as an express contract between the parties, and the day specified in this express contract as a single night watch running from sunset to midnight or from midnight to sunrise, it is manifest that the deviation of requiring the servant to serve from sunset to sunrise, of requiring one man to do the work of two men within the contemplation of the contract, is too gross a deviation to come within the exceptions allowed by the common law. The regulations provide that two watches shall share the duty of the night, and that the second shall be on duty from midnight to sunrise and until relieved. The relief often came late. But in this the regulations follow the common law, and for such additional service a night inspector certainly can not recover. But that is a very different thing from requiring him to serve just twice as long as it was expressly agreed he should serve.

If we regard the regulations as having the force of law and being in effect a statute regulating the particular employment, the case in the books nearest to this one is probably that of Bachelder v. Bickford (62 Maine R., 526), which we quote in extenso:

"WALTON, J.:

"When a contract to work in a gristmill at eight shillings per day, to be paid weekly, is silent as to the length of time that shall constitute a day's work, the rule established by the statutes of this State, that 'in all contracts for labor ten hours of actual labor shall be a legal day's work, unless the contract stipulates for a longer time,' is applicable (R. S., c. 82, sec. 36). And if the laborer works nights, after his legal day's work is done, at the request of his employer and for his benefit, the law implies a promise on his part to pay for such labor. Acceptance of pay for the day labor will be no bar to a recovery for the night labor. It is true that the above rule is not applicable to 'monthly labor,' nor to 'agricultural employments.' But in our judgment work in a gristmill, at eight shillings per day, to be paid weekly, is not monthly labor nor agricultural employment.

"Such, in effect, was the ruling in this case. We think the ruling was correct."

It seems to the court that regulations of the Treasury issued under authority of law for the regulation of the service of night inspectors in all the ports of entry in the United States and actually in force and operation in all of the principal ports, except the port of Baltimore, have the force of law and take the place of the statute mentioned in the above opinion; and it also seems to the court that requiring an inspector of the first watch to render service through the second watch is analogous to the day and night service in the Maine case.

While we have referred to the law of master and servant as furnishing analogies by which to determine in what cases additional compensation can and can not be recovered for additional service, it must be remembered that this is the case of a public official serving for compensation attached to an office by law. The compensation of a public officer is not necessarily regulated or limited by the law of master and servant. His salary or pay is generally fixed and certain. It can not be diminished by official authority, as in Sleigh's Case (9 C. Cls. R., 369), where payment was withheld on account of sickness, or refused him because Congress had failed to appropriate the full amount, as in Graham's Case (1 id., 380). Where a public compensation is a salary fixed by statute it ordinarily covers all the official service of the term of office; but in the present case the law designates no term of office and provides no salary. A daily pay implies a daily service; and when the regulations of a Department, having the force of law, prescribe what that daily service shall be, it becomes as complete a thing with reference to the daily pay as a year's service is with reference to an annual salary. The night service of inspectors of customs is a peculiar thing and a proper subject for Departmental regulation. When the authorities of the port of Baltimore required the night inspectors to go on duty sixty night watches in a month, while the regulations said they should be on duty only thirty night watches in a month, it is manifest that the inspectors should be paid for sixty of these units of service, and that when the Government paid for only thirty it was paying for one man's service where the regulations in

effect provided that it should pay for two. If the Government had employed two inspectors to do the work of two, and had given to the inspectors on duty through two night watches, the alternate nights of rest assured to them by the regulations, the result in money would have been the same as that now reached by the decision of this case.

16 The counsel for the defendants has likened this case to Harrison's (26 C. Cls. R., 259) and has argued that the credit to which the claimant was entitled was on the other side of the account; that he was not entitled to more money, but to more rest, and that when he did not get the rest which was promised him on each alternate night of all-night service, his only remedy was to resign. That might be true if the claimant had been employed by the month or year. But it is plain that during his period of employment, from the 1st of April, 1882, to the 25th of August, 1886, he rendered service through 2,196 night watches, while the regulations at the same time required him to render it only through 1,098. The additional 1,098 were consequently additional service, for which he was not paid, and for which, in the opinion of the court, he is entitled to recover.

There are two other points in the case which should be noted.

The time when the claimant's service as night inspector began was April 1, 1882, but this action was not brought until August 24, 1888. Consequently so much of the claim as accrued prior to August 24, 1882, is barred by the statute of limitations. The defendants have filed no plea setting up the statute, nor moved to strike out this much of the demand; nor was the attention of the court called to this defense pro tanto on the trial. But under the decision of the Supreme Court in Finn v. The United States (123 U. S. R., 227) this is a defense which the court is bound to notice. And in the absence of proof or explanation to the contrary, the court must assume that all of the nights between the 1st of April and 24th of August, 1882, were nights of double duty, and the court, therefore, must exclude from the claimant's recovery pay for 144 days.

The second point relates to a question of evidence.

The claimant has testified that he was on all-night duty, except when absent from sickness or other causes, for 1,352 nights. This is in a measure corroborated by the records of the Department, which show that he was recognized as on duty 1,353 days. The claimant does not specify the particular nights on which he did double duty; he kept no record, and obtained his figures by going to the record kept by the clerk of night inspectors and getting from it the number of nights for which he was credited with service. But it appears by the testimony of the surveyor of the port that when the number of vessels coming into port fell off and the whole force was not required for duty, so many of the inspectors as were not needed would be excused; and it appears by the report of the deputy collector of the port to the Secretary of the Treasury (which we understand to be a statement for services paid for) that the number of nights when the claimant was present and doing duty, during his entire period of service, was 1,608, and the number he was absent 255. On these 255 nights, therefore, the presumption is the claimant received what he was entitled to, and all that he was entitled to, viz, pay with absence from duty; and the reason why he was entitled to pay with absence from duty was because he had rendered double duty on 255

nights of the 1,608 nights in the other column. For these 255 nights of double duty the claimant, therefore, is entitled to nothing; he received full compensation for them when he received pay for 255 other nights during which he rendered no service. Accordingly, 255 must be substracted from the 1,353 of double duty, leaving 1,098; and from this number, 1,098, there must be substracted 144, barred by the statute of limitations, leaving 954 for which he is entitled to recover.

The judgment of the court is that the claimant recover $2,862.

17 VIII.—*Opinion on the motion of defendants for a new trial and order overruling same, filed November 25, 1895.*

NOTT, J., delivered the opinion of the court:

This is in effect a motion on the part of the defendants, founded on the facts found, to set aside the judgment heretofore rendered in favor of the claimant and to enter judgment in favor of the defendants.

The grounds upon which the motion is placed are that the Revised Statutes (sec. 1764, 1765) and the Act 20th June, 1874 (18 Stat. L., p. 109, sec. 4), prohibit additional pay for extra services; that this court held in Harrison's Case (26 C. Cls. R., 259) that an employee in the Government Printing Office who does not receive a leave of absence is not entitled to recover double pay when the leave is refused; that the Supreme Court held in Martin's Case (94 U. S. R., 400) that a laborer who was compelled to work more than eight hours a day, contrary to the eight-hour law, could not recover for the additional time; and that this court held in Post's Case (27 C. Cls. R., 244) that the word day in a statute referring to compensation can not be made to mean anything except a calendar day.

Between this case and those relied upon by the Attorney-General it is believed by the court well-grounded distinctions exist which may thus be stated:

The distinction between this case and Post's is that here the regulations of the Treasury Department, made under the statute and having the force of law, define the statutory day as something different from the calendar day, and provide expressly that two statutory days' service may be rendered in one calendar day. They go further and provide that a night inspector may receive pay for a calendar day during which he renders no service whatever. It is these provisions of the regulations which form the groundwork of the court's opinion and distinguish this case from all other cases; that is to say, from all cases seeking additional or extra pay. Whether these regulations are authorized by law may well be doubted. But having been in force for a number of years, and in operation in every port of the United States, except at the port of Baltimore, and having received the tacit, if not express, approval of Congress, this court does not feel at liberty to disregard them and hold that they are not authorized by law.

The distinction between this case and Harrison's is that there the claimant was not entitled as a matter of legal right to a vacation with pay, but only to a leave of absence for a restricted period when, in the discretion of the Public Printer, such leave could be granted without detriment to the public business; and the Public Printer had not the shadow of legal

authority for making a gift of money where the state of the public business did not admit of his giving a workman a leave of absence.

18 Here the regulations expressly provided that the night inspectors should receive, in certain contingencies, leave of absence with pay, and left no discretion in their superior officers to order otherwise. In the one case the legal right, which must be the foundation of a suit at law, did not exist; in the other it does.

The distinction between this case and Martin's is that there the claimant was seeking to recover additional compensation for extra time where such additional compensation was prohibited by law. Here the suit is not to recover for extra time, but for a day's service rendered which has never been paid for. The claimant has done two days' work and been paid for only one. The unpaid-for service was not additional or extra, but entire and complete, a thing by itself. The compensation which the court awarded was not compensation prohibited by law, but, in the opinion of the court, the exact compensation prescribed by law. Whether the regulations have the force of law, whether they make the law of the case and fix the claimant's legal right, as was before said, may well be questioned; but this court, for the reasons before given, does not feel at liberty to disregard them.

In Martin's Case the Supreme Court, in the construction of the eight-hour law, followed the general principle of the law of master and servant, that the servant can not recover additional compensation for overhours. This court, in the interpretation of the law in the present case, has followed the other principle, that the master can not require the servant to render a service which is beyond the sphere of his proper employment, nor to render both day and night service where he was hired to render only one of them. Where a night watch of these inspectors ran beyond the prescribed limit—where an inspector instead of being relieved at midnight was compelled to serve until one or two or three o'clock in the morning—it is a case of overhours, or extra time, for which he can not recover. But where he rendered two distinct, entire statutory days' services, though in one calendar day of twenty-four hours, it was service beyond his proper employment, and he is as much entitled to compensation for the one statutory day as for the other. When each of two things as legally defined is complete and distinct, it can not properly be said that the one is an additional part of the other. If a farmer had agreed to deliver at a military post one cord of wood a day for one year, and had been required on some days to deliver two cords instead of one, and in the course of the year had delivered five hundred cords instead of three hundred and sixty-five, he would have been paid without a doubt for the number of cords delivered and not for the number of days in the year. Here the regulations, which may be considered as taking the place of a contract, required the night inspectors to do duty for one night watch a day on every day in the year. On many days they were required to perform the duty through two night watches, and in the course of a year to perform to the extent of, say, five hundred night watches instead of three hundred and sixty-five. If the regulations have the force of law, it seems to the court that the case of the inspectors is as clear as the case of the farmer.

The order of the court is that the motion of the defendants be overruled.

BY THE COURT.

19 IX.—*Former judgment set aside and re-formed judgment entered, November 25, 1896.*

DIXON N. GARLINGER
vs.
THE UNITED STATES. } 16312.

At a Court of Claims held in the city of Washington on the 25th day of November, A. D. 1895, it was ordered that the judgment entered herein on the 18th day of March, 1895, be vacated and set aside, and that judgment in lieu thereof be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said Dixon N. Garlinger do have and recover of and from the United States the sum of two thousand eight hundred and sixty-two dollars ($2,862).

BY THE COURT.

20 X.—*Application of defendants for and allowance of appeal.*

DIXON N. GARLINGER
vs.
THE UNITED STATES. } 16312.

From the judgment rendered in the above-entitled cause, on the 25th day of November, 1895, in favor of the claimant, the defendants, by their Attorney-General, on the 9th day of January, 1896, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Atty. General.

Filed January 9, 1896, and allowed in open court January 13, 1896.

WILLIAM A. RICHARDSON,
Chief Justice.

21 In the Court of Claims.

DIXON N. GARLINGER
vs.
THE UNITED STATES. } No. 16312.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the judgment entered March 18, 1895, of the claimant's motion to correct findings and allowance thereof, of the defendants' motion for a new trial, and the opinion and order overruling said motion, of the amended findings of fact and conclusion of law, of the corrected opinion of the court, of the re-formed judgment of the court, of the application of the defendants for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17 day of January, A. D. 1896.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

22 In the Court of Claims. Term 1895–1896.

DIXON N. GARLINGER
vs.
UNITED STATES. } No. 16312.

At a Court of Claims held in the city of Washington on the sixth day of April, 1896, the court filed an order overruling defendant's motion for new trial and the request for finding by said defendants and filing an additional finding numbered X.

The annexed copy of said order, including said additional finding of fact, is hereby certified to the Supreme Court of the United States, to form part of the record on appeal in said cause, which was heretofore, to wit, on the 17th day of January, 1896, certified to said Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 10th day of April, A. D. 1896.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

23 Court of Claims.

DIXON N. GARLINGER
v.
THE UNITED STATES. } No. 16312.

ORDER.

It is ordered that the defendant's motion for a new trial, filed March 19, 1896, be overruled.

It is further ordered that the following additional finding of fact be filed as one of the findings of fact in this case:

X.

Of the 954 days set forth in Finding IV 422 days occurred prior to July 1st, 1884, and 532 days occurred after that date. It does not appear that the hours of service of night inspectors or length of the night watches were changed at any port of the United States subsequent to the promulgation of the "General Regulations under Customs and Navigation Laws of the United States," 1884, but, on the contrary, continued, as set forth in Finding VII.

The defendant's request that "the regulations referred to and described in the VII, VIII, and IX findings remained in force until July 1st, 1884, and on that day were repealed, and other regulations established in their stead, which contained no provision fixing the time of service and tours of duty of night inspectors" is refused. The court does not regard the regulations of an Executive Department, made in pursuance of a statute, as a matter of evidence.

BY THE COURT.

Filed April 6, 1896.

A true copy. Test this 10th day of April, 1896.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Ct. of Claims.

(Indorsement on cover:) Case No. 16273. Term No. 166. The United States, appellant, *vs.* Dixon N. Garlinger. Court of Claims. Filed April 30, 1896.

No. 166.

Brief of Atty. Gen.l (Pratt & Gorm
for Appts.

Filed Dec. 1, 1897.

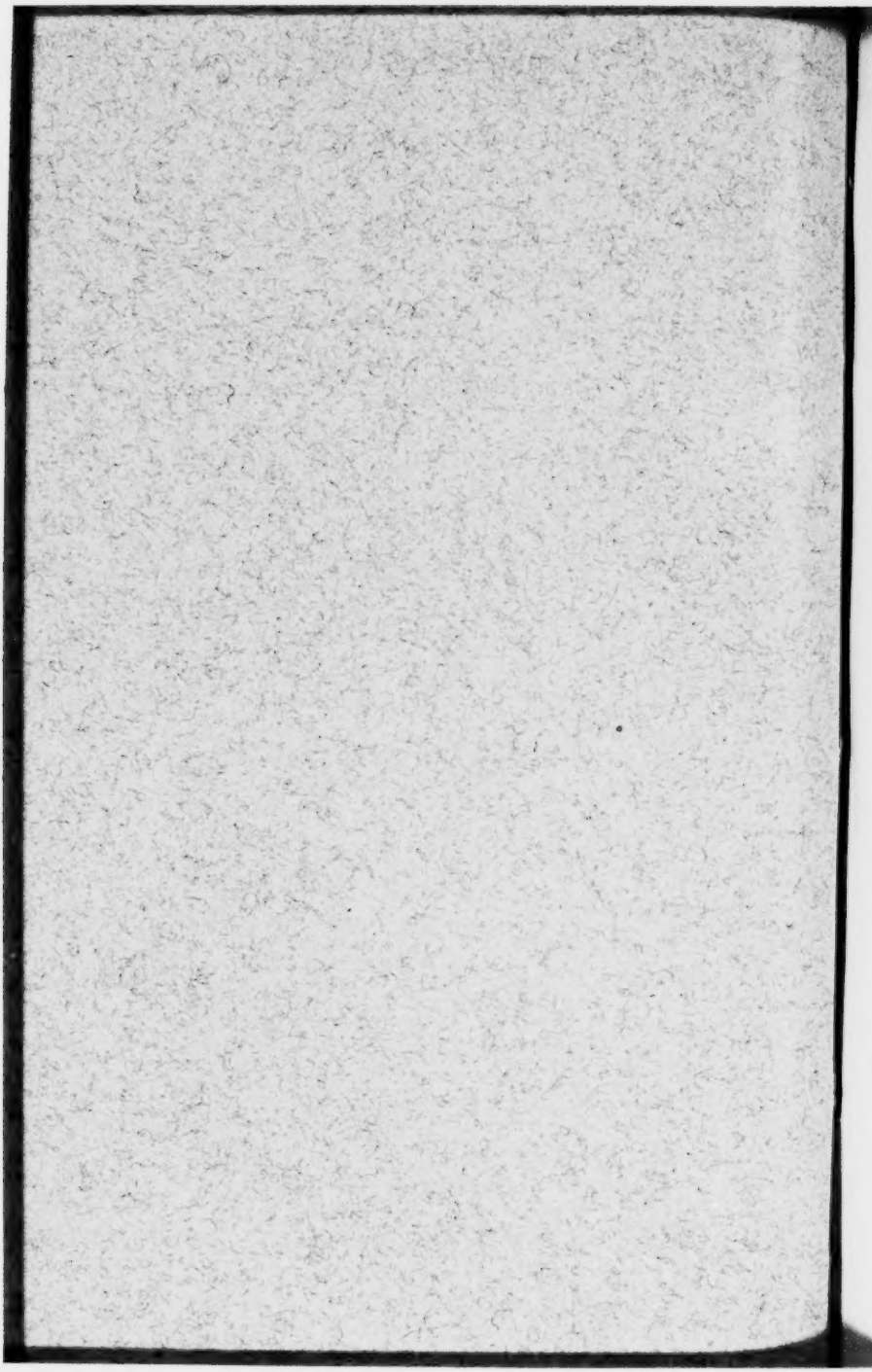
In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANTS,
v.
DIXON N. GARLINGER, APPELLEE. } No. 166.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE APPELLANTS.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANTS,
v.
DIXON N. GARLINGER, APPELLEE. } No. 166.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE APPELLANTS.

STATEMENT.

The appellee was appointed a night inspector in the customs service of the United States at the port of Baltimore, Md., on April 1, 1882, and continued to fill said office until August 25, 1886, a period of sixteen hundred and eight days, for which said period he was paid the statutory compensation of $3 per day (Rev. Stat., sec. 2733), which said payment was made up as follows: Thirteen hundred and fifty-three payments were for night service when he was present rendering actual service,

and 255 were for night service when he was absent and off duty—making a total of 1,608 nights, covering the entire period of his employment. (See Findings I and II, Rec., p. 5.)

Notwithstanding the fact that he has been paid all his statutory compensation, he now demands that he shall be paid over again for one-half of the time, because of a certain Treasury Department regulation (see Finding III, Rec., p. 6) providing for the division of the work into two watches, and further providing that if the employee be required to serve all night upon a given night he would be excused from service on the following night—his contention being that these "off nights" were his property, and that if they were used by the Government they must be paid for as extra or additional service; also contending that he was required to work more hours than were sufficient to constitute a "day." In these contentions the court below concurred, rendering judgment for the amount claimed, minus the amount barred by the statute of limitations, and minus the pay received for the 255 nights when he rendered no actual service, but was paid therefor as though he had been on duty. (See Rec., pp. 10 and 11.) From the judgment thus rendered against them the appellants have appealed to this court.

The questions presented in this appeal are of the utmost importance to the United States, for the reason that there are now pending in the Court of Claims and before the Treasury Department a great many cases involving the same questions as are here presented and

which will necessarily be controlled by the decision in this case. The amount involved in the cases now pending in the Treasury Department similar to the one at bar is something more than $100,000.

SPECIFICATION OF ERRORS.

The court below erred:

I. In holding that the provisions of the Treasury Department regulations, as set forth in Finding VIII (Rec., p. 6), constituted either a contract of employment between the appellants and the appellee, or that said regulations were made in pursuance of law and had the force and effect of law, and in placing such a construction thereon as to lead to a judgment in favor of the appellee and against the appellants in any sum whatsoever.

II. In holding that said regulations of the Treasury Department of 1874 continued in force or effect subsequent to March 24, 1883, or in rendering judgment against the appellants for any period in excess of 324 nights, or in any sum in excess of $972.

III. In refusing to grant the request of the appellants, as set forth in Finding X (Rec., p. 14), and in holding that said regulations of 1884 were not matters of evidence.

IV. In rendering judgment in favor of the appellee for any extra or additional service rendered subsequent to July 1, 1884, or for any period in excess of 417 nights, or for any sum in excess of $1,251.

V. In setting forth certain Treasury regulations in Findings VI, VII, VIII, and IX, and in holding them to be matters of evidence in this cause.

BRIEF.

I.

Section 2733 of the Revised Statutes, under the authority of which the appellee was employed, provides:

> Each inspector shall receive, for every day he shall be actually employed in aid of the customs, three dollars; and for every other person that the collector may find it necessary or expedient to employ, as occasional inspector, or in any other way in aid of the revenue, a like sum, when actually so employed, not exceeding three dollars for every day so employed.

The compensation provided for by this act has been paid to the appellee for his entire period of service. He claims, however, and the court below allowed him, half as much again, because he was required to serve all night instead of half a night—from sunset to sunrise instead of from sunset to midnight. This decision is based upon certain regulations made by the Treasury Department, and which are set out in Finding VIII (Rec., p. 6) as follows:

> ARTICLE 420. The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches. Whenever it is necessary to assign a night watchman to a vessel or to any other all-night charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night.

The court below proceeded in its opinion upon two hypotheses: First. That the above-quoted regulation was to be regarded as the contract of employment between the appellee and the appellants; or, second, that the above-quoted regulation was to be regarded as being issued under authority of law for the regulation of the service of night inspectors, and that the same had the force of law and is in effect a statute. (See court's opinion, Rec., pp. 8 and 9.) It is true that the court, in its opinion overruling the defendants' motion for a new trial (Rec., p. 11), subsequently doubts the latter proposition and in effect overrules itself, the court saying: "Whether these regulations are authorized by law may well be doubted;" and toward the close of the opinion (Rec., p. 12) the court again refers to these regulations as "considered as taking the place of a contract." But inasmuch as this case is made to rest alternately first upon one hypothesis and then upon the other, it will be well to consider the cause in both aspects.

II.

THE TREASURY REGULATIONS OF 1874 DID NOT CONSTITUTE AN EXPRESS CONTRACT OF EMPLOYMENT BETWEEN THE APPELLANTS AND THE APPELLEE.

First, then, let us see whether this regulation can in any proper sense be regarded as a contract of employment between the appellee and the appellants. In the first place, it will be observed that this regulation was not in force at the port of Baltimore, where the appellee served, and that while these regulations were enforced

at other ports they had not been enforced at the port of Baltimore, at which said port the custom of dividing the night watches, and of giving a vacation or leave of absence on the night succeeding an all-night employment had not obtained; but, on the contrary, the surveyor of that port had always required the night inspectors to serve from sunset to sunrise. (See Finding VII, Rec., pp. 5 and 6.) The court finds that a copy of the pocket edition of the rules and regulations governing inspectors was handed to the claimant at the time of his employment, but there is nothing in this record to show that his attention was drawn to the regulation above quoted, or that any conversation was had between the appellee and the collector of the port on that subject, but on the contrary, since it is shown that said regulation was not enforced at that port, it is to be presumed that the appellee was cognizant of that fact, and was cognizant of the facts that the hours of duty and the period of the watches were such as the surveyor of the port might from time to time require, according to the exigencies of the situation. But suppose such a regulation had been brought to the attention of the appellee at the time of his employment. That would not have constituted a contract between him and the appellants. Conceding for the moment that the Secretary of the Treasury, in the face of the provisions of section 2733, Revised Statutes, and in face of the provisions of other laws of the United States to which we shall presently refer, possessed any power, right, or authority to regulate the number of hours which should constitute a day in amounts less than a calendar

day, it would certainly follow that if he had the right to regulate them at one time he would have the right to change them at another and at his will, without any knowledge or consent on the part of the appellee, as in fact was often done. Certainly, then, this could not be regarded as a contract, for it does not possess the necessary elements to make up a contract. A contract must be mutual, must be certain, must be binding upon both parties alike, and one party to it can not annul or change it without the other's consent; hence it would follow that if this regulation was a contract then the Secretary of the Treasury could not alter or modify the regulation without the consent of the appellee, and without the consent of all of the night inspectors in the United States. Certainly such a doctrine would fall little short of absurdity. It is well enough to argue by analogy, if one is careful to keep one's analogy correct, but the most misleading and fallacious of all arguments are to be found in those so-called arguments by analogy where the analogy does not properly exist. The court below begins it opinion (Rec., p. 8) by a very lucid and interesting exposition of the law of master and servant, illustrating from the common law the principles applicable to that doctrine, for the purpose of showing that the master, while he can require of a servant in unusual exigencies additional service, he can not require unreasonable service, and the court then applies these doctrines to the case at bar in the following language (Rec., p. 8):

> If we regard the case before us as one of master and servant, and the regulations of the Secretary of the Treasury as an express contract between the

parties, and the days specified in this contract as a single night watch running from sunset to midnight or from midnight to sunrise, it is manifest that the deviation of requiring the servant to serve from sunset to sunrise, of requiring one man to do the work of two men within the contemplation of the contract, is too gross a deviation to come within the exceptions allowed by the common law.

There is no analogy between the contractual relations of master and servant at common law and the statutory relations of employment between the United States and its servants. A statute, or for that matter a regulation of a Department, can never be in any appropriate sense called a contract, because it may be changed by Congress or by the head of the Department without the knowledge or consent of the employee; and while it is binding upon the employee so long as it continues in force, it is never binding upon the United States except so long as the Congress chooses to retain the law or the head of the Department to continue the regulation in force. It is idle, therefore, to build up any argument founded upon this false analogy. To do so is to beg the question at issue in this case.

III.

THE FACTS NEGATIVE ANY MOTION OF AN IMPLIED PROMISE TO PAY ANY ADDITIONAL SUM BEYOND THE STATUTORY RATE.

It is equally impossible to find in this regulation any analogy to an implied assumpsit or an implied contract. An implied contract is in no wise different from an express contract, except in so far as it relates to the method of proof, which belongs to the law of evidence.

In the one case the contract is made by the express written or spoken words of the parties, and in the other it is implied either from the words or the acts of the parties—implied, because the words or acts of the parties excluded any other hypothesis than that of a contract, real but not expressed. This doctrine is nowhere better expressed than by Mr. Justice Story in his work on contracts (Story on Contracts, 5th ed., sec. 11), where that learned jurist says:

> When the agreement is a matter of inference and deduction, it is called an implied contract. Both species of contract, however, are equally founded on the actual agreement of the parties, and the only distinction between them is in regard to the mode of proof, which belongs to the law of evidence. In an implied contract the law only supplies that which, although not stated, must be presumed to have been the agreement intended by the parties.

Tested by this principle, it will be readily seen that there is nothing in this transaction upon which to predicate an implied agreement. By reference to Finding V (Rec., p. 5), the court will observe that the court below found as a fact that the appellee protested to his superior officer, the surveyor of the port, against being required to perform the duty of an all-night watch without being excused from service on the next succeeding night. But the court did not find, and it is not a fact, that the surveyor of the port of Baltimore or any other officer of the United States concurred in this contention or claim of the appellee, or said or did anything upon which an implication of a promise or agreement to pay extra or additional compensation can be founded. On the con-

trary, the only logical deduction that can be made from the facts set out in Finding V is that although this protest was made by the appellee, his contention was repudiated and denied by the surveyor of the port. It certainly was not acquiesced in by that officer, and the facts do not show the semblance of an agreement for additional pay, either from the fact that the appellee was required to serve two watches, or that he was not at all times excused from the performance of duty the night following an all-night watch. There is, we submit, nothing in this transaction from which the court could imply a promise on the part of the appellants to pay the appellee for any additional service.

He who asserts an implied contract must prove a *contract.* Either there must be an express contract between the parties or else the thing furnished by the one party and accepted by the other must have been furnished and received under such circumstances as will show that the party furnishing it expected at the time to be paid, and that the party receiving it knew of this expectation, and, so knowing, received and accepted the benefit of the thing furnished. Then, if the party receiving does not promise to pay, the law will promise for him; that is, the law will imply a promise on his part. But the law will do this under no other circumstances. The mere fact that something was furnished by one party and received by another will not justify an implied promise to pay for it.

Holmes v. *Board of Trade,* 81 Mo., 137.
Day v. *Caton,* 119 Mass., 513.
Potter v. *Carpenter,* 76 N. Y., 157.
O'Connor v. *Hurley,* 147 Mass., 144, 148.

The learned court below appears to have overlooked these fundamental principles, and herein lies the error of applying the case of *Bachelder* v. *Bickford* (62 Me., 526) to the case at bar, for in that case there was a statute of the State which distinctly prescribed that, in the absence of contractual stipulations to the contrary, ten hours should constitute a day's work. Therefore the court held that when a miller, at the request of his employer and for his employer's benefit, worked during the solar day and also during the nighttime without any express contract or agreement, and without anything whatever having been said by one party or the other concerning the rate to be paid, the court would look at the law regulating the day of ten hours and from the facts of the case imply a contract on the part of the employer to pay the employee additional compensation for work in excess of the statutory day. But that is very far from being this case. If the miller in the case of *Bachelder* v. *Bickford* had protested to his employer that his contract of employment did not require him to work at night, and if that employer had repudiated such a construction of the contract of employment existing between them, contending that the contract of employment under which the miller served did require him to work at night as well as during the solar day, and the miller, although protesting, had acquiesced in this contention of his employer and worked during the night, certainly the court could not have implied any promise on the part of the employer to pay for a thing which he had expressly declared to the employee he would not pay for. There would have been no room for any such implication, and to have implied a promise to pay under

those circumstances would have been in plain violation of the agreement between the parties. It would not have been the interpretation of an existing contract, but the making of a new one. (See *Hawkins* v. *United States*, 96 U. S., 689, 696, 697, 698 and cases cited.) The analogy therefore fails, and the case can not be invoked in control of the case at bar, for here the appellee claimed one thing and the appellants another, and the appellee—whatever may have been his spoken words—acquiesced in the contention of the appellants and performed the duty which they required of him to perform, at the times and in the manner by them required. Where, then, is there any room for implying a promise to pay that which the appellants expressly said they would not pay? Even if the appellee had worked under the eight-hour law (15 Statutes, 77), the facts in this case would prevent the implication of a promise to pay for labor in excess of eight hours, for the appellee was informed that if he desired to retain his position he must work in the manner and for the time required of him by the surveyor of the port, and in this respect the case at bar is identical with that of *The United States* v. *Martin* (94 U. S., 440), wherein this court held that where a laborer who was in the habit of working for the Government twelve hours a day for $2.50 per day is informed by the proper authority that if he remains in the service at that compensation he must continue to work twelve hours a day, and he does so continue and is paid accordingly, he can not afterwards recover for the additional time over eight hours as a day's labor, notwithstanding the existence of the eight-hour law.

These doctrines are so admirably expressed in the case of *Grisell* v. *Noel* (9 Ind. App., 251, 258–261) that we may be pardoned for an extensive quotation from that opinion:

> It is the theory of appellant that, by virtue of the statute commonly known as the eight-hour law, he is entitled, without any special agreement, to receive extra pay for all the time he worked for the appellee over eight hours in any calendar day. Under the act approved March 6, 1889, eight hours is declared to constitute a legal day's work for all classes of mechanics, workmen, and laborers, excepting those engaged in domestic labor, but overwork for extra compensation, by agreement, is expressly permitted. Elliott's Supp., section 1606. * * *
>
> It was not intended by the statute in question to abridge the right of contracting for a greater number of hours than eight in any calendar day, and any attempt to do so must inevitably fail of the result desired, for the abundant reason that the reduction of the hours of labor would inevitably be followed by a corresponding reduction of the rate of compensation, and would in the end leave the parties in the condition they were before the law was enacted.
>
> The statute itself permits the parties to contract for extra time and compensation, and this, we apprehend, they would have *the right to do without the statute*. If parties may agree that for a day of eight hours the employee shall receive a stipulated sum, they also have the right to agree that for a day of more than eight hours he shall receive a definite sum.
>
> The parties to this action certainly had the right to stipulate that for a day of eight hours the appellant should receive $1, and for a day of eleven hours

$1.25, the 25 cents being the compensation for overwork. The fact that the subject of extra compensation was not mentioned would not in the least impair the validity of a contract for $1.25 for every day of eleven hours' work. If the parties could make an express contract of that tenor, the law will uphold an implied agreement to the same effect. The appellant must recover, if at all, either upon an express contract or on an implied one. If one person employs another to perform a single day's labor for him at $1.25, and at the end of that day the employer pays the laborer $1.25, and the latter accepts it in payment of the day's work, he can not afterwards recover an additional sum, albeit he may have worked nine or ten or eleven hours instead of eight hours, and notwithstanding the law under examination makes eight hours a legal day's work.

The acts and conduct of the parties in the case supposed are such as to raise a conclusive presumption that the amount received by the employee was accepted in full payment of what was due him. The same rule applies when the work is done by the week or month or year. There can be no doubt that in the present case the appellee paid, and the appellant accepted, at the end of each week, the sum of $7.50 in full payment of the work done by him during the previous week.

The appellant testified, in effect, that he knew when he entered upon appellee's employment the nature and the amount of the work that was required of him, as well as the compensation he was to receive therefor. If, however, at the end of the first day or the first week he found that the number of hours he was to work per day was greater than he expected, or that the compensation he was to receive for a day's work was not for eight, but for ten or

eleven hours of such work, and he was not satisfied with such arrangement, he should have demanded more pay or insisted on a smaller number of hours of work per day, and he should have exacted an agreement to that effect from his employer. If the latter refused to accede to this, the appellant had his option to quit the employment or to continue at the same rates. By continuing in the employer's service under the terms of the employment, he waived any right to claim additional compensation. This question was fully passed upon and decided by this court in the case of *Helphenstine* v. *Hartig*, 5 Ind. App., 172.

That decision is still in accord with our views of the law.

Under a New York statute, of which ours is almost an exact copy, the court of appeals reached the same conclusion in a case the facts of which were almost identical with those of the present one. It was there held that "The intent of the act was to place the control of the hours of labor within the discretion of the employee, giving him the privilege at his option to refuse to work beyond the eight hours, or to secure extra compensation for extra work by stipulation in the contract of employment. In the absence of any such stipulation the language of the act repels any inference of an intent to confer a right upon an employee to charge for more than one day's labor for services rendered in any calendar day; and for such services he may not demand any extra compensation." (*McCarthy* v. *Mayor, etc., City of N. Y.*, 96 N. Y., 1.)

To the same effect see *United States* v. *Martin*, 94 U. S., 400; *Schurr* v. *Savigny*, 85 Mich., 144, 48 N. W. Rep., 547; *Luske* v. *Hotchkiss*, 37 Conn., 219; *Brooks* v. *Cotton*, 48 N. H., 50.

IV.

EVEN IF A BREACH OF CONTRACT WERE SHOWN, NO RECOVERY COULD BE HAD BEYOND THE SUM ALREADY PAID.

Even if this regulation of 1874 could be regarded as an express contract of employment between the appellants and the appellee, and even if it should be considered that the appellants had violated the agreement, still we insist that the appellee has already been paid everything to which he is entitled. It will be observed that this regulation merely provides that "whenever it is necessary to assign a night watchman to a vessel or any other 'all-night' charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night;" in other words, the regulation provides for more rest and not for more pay. If it had been the intention to allow double pay under such circumstances, it would have been perfectly easy to have said so in unmistakable language. But there is no such provision, and the provision is only to the effect that the inspector shall be entitled to a holiday on the night succeeding an all-night watch. He was not given such holiday, it is true, but he has been paid in full for that day's service, and he can not recover double pay for that period.

In this respect the case at bar is identical with the case of *Schurr* v. *Savigny* (85 Mich., 144, 149, 151). In that case Schurr had a contract of employment with the defendant in error as an expert photographer and finisher

at and for the sum of $20 per week, the contract providing that the plaintiff in error should be entitled to a vacation of two weeks in each year. The contract did not provide for any special number of hours per day, and the plaintiff sued for extra and additional compensation upon the ground that the statutes of Michigan constituted ten hours a day's labor, and that work performed by the plaintiff in addition to that time should be paid for as extra work. The court disposed of the first contention by holding that the Michigan statute was not applicable to this class of employment, resting its decision upon the doctrine of master and servant, and holding that although under the ordinary doctrine of master and servant the servant is not compelled to work for more hours than could have been reasonably required under his contract, yet if the servant does labor an unreasonable number of hours, or more than he has contracted to do, he can not recover extra pay unless there is an express promise made by the defendant to pay therefor.

Upon the second branch of the case, to wit, his demand to be paid double the amount of his contractual rate for the two weeks in which he was entitled to a vacation under his contract but did not receive the same, the court said:

> The court was in error in directing the jury that the plaintiff was entitled to recover for the two weeks' employment during which time he might have taken his vacation. It appears from the record that he was paid $20 per week for these two weeks, and there is nothing in the contract of employment by which it can be implied that the plaintiff should receive double compensation for two weeks' time during the year.

The contract between the parties was an express one, covering the entire matter. There was therefore no room for any implied agreement or understanding about wages, and the contract price could not be increased without some further agreement between the parties to that effect. It appears that the plaintiff entered upon such employment under an express contract at $20 per week. He was paid, week by week, the full contract price during the entire year, except the last two weeks, and during the whole time it is conceded that he made no claim or demand upon the defendants for extra compensation until the close of his employment and discharge from the service of the defendants, when for the first time, and after the claim had been put into the hands of his attorney, was any claim made that he intended to hold the defendants liable for extra evenings' work, or double compensation by reason of the agreement for the two weeks' vacation.

It appears that at the close of the testimony defendants' counsel requested the court to charge the jury—

"There is no proof tending to show an express promise by defendants to pay the plaintiff anything for overtime, even if the plaintiff did work for the defendants more hours and more time than he could have been required to labor reasonably by the terms of his contract. A servant can not be required to labor an unreasonable number of hours, but if the servant does labor an unreasonable number of hours, or more than he has contracted to do, * * * he can not recover extra payment unless there is an express promise to pay him therefor."

The court was also asked to instruct the jury—

"If you find that the defendants refused to allow the plaintiff the two weeks' vacation, still the plaintiff

can not recover for this failure, it appearing that he was paid the usual wages for those two weeks."

The court refused to give these instructions to the jury. This was error, as it appears that the plaintiff remained there voluntarily and performed services for which he was paid, and did not call for his vacation, nor make any claim thereto until after his time of employment ended. The defendants, under the facts shown by this record, were entitled to these instructions.

V.

THERE IS NO OBLIGATION ON THE APPELLANTS ARISING EX LEGE OR QUASI EX LEGE, BECAUSE THE TREASURY REGULATIONS OF 1874, IF THEY ARE TO RECEIVE THE CONSTRUCTION PLACED UPON THEM BY THE COURT BELOW, ARE IN CONFLICT WITH LAW, AND NULL AND VOID.

The liability of the appellants in this case, if any exists, must be found in the second theory advanced by the court below, to wit, the argument that these regulations of the Treasury Department, being made pursuant to law, have the force of law, and that the appellants' liability arises *quasi ex lege*.

Assuming that the Secretary of the Treasury has authority to promulgate rules and regulations for the enforcement of customs laws, his authority in this respect is certainly subservient to law, and such regulations must be in conformity with law and not in conflict with any United States statute. If any regulation is made by any executive officer which is contrary either to the spirit or the letter of the law, it must, of course, give way to the law; and before any rights can be predicated upon these regulations

of the Treasury Department it must first be determined whether the regulation itself or the construction which has been placed upon the regulation by the Court of Claims is in conflict with the law of the land. This inquiry was not made by the court below. The court finds that the regulations existed. It then proceeds to place a certain construction upon those regulations, and upon its construction of an existing regulation it assumes that the same was in conformity to law, and upon such construction and assumption built up a liability on the part of the appellants. The court below not only did not hold that these regulations were in conformity with law and were rightfully and properly promulgated by the Secretary of the Treasury within the scope of his authority as head of a Department, but, on the contrary, very gravely doubted the proposition, saying "whether these regulations are authorized by law may well be doubted" (Rec., p. 11), but yet that the court did not feel at liberty to disregard them, because they had been in existence for a great number of years and had met with the tacit approval of the Congress. This latter sentence we shall notice presently. For the present let us proceed with the inquiry whether these regulations were in conformity with the law.

In the first place, these regulations—that is to say, if the regulations mean what the court below has construed them to mean—are hopelessly in conflict with section 2733 of the Revised Statutes. That section provides as follows:

> Each inspector shall receive, for every day he shall be actually employed in aid of the customs, three dollars; and for every other person that the collector

> may find it necessary or expedient to employ as occasional inspector, or in any other way in aid of the revenue, a like sum, when actually so employed, not exceeding three dollars for every day so employed.

And section 2737 of the Revised Statutes provides that—

> The Secretary of the Treasury may increase the compensation of inspectors of customs in such ports as he may think it advisable so to do, and may designate, by adding to the present compensation of such officer, a sum not exceeding one dollar per day.

These two statutes are distinct, plain, and mandatory in their requirements, to the effect that no inspector shall be paid more than $3 per day for every day of actual service, and in its authorization of the Secretary of the Treasury to increase that amount at his option, provided such increase does not exceed the sum of $1 per day. These statutes, therefore, absolutely prohibit the payment to an inspector more than $4 per day. The Secretary of the Treasury is prohibited from making any payment in excess of this sum, and therefore any rule or regulation promulgated by the Secretary of the Treasury which results in a payment of more than this sum is plainly and expressly in conflict with these statutes, and therefore null and void. In the next subdivision of the brief we shall submit that the construction placed upon these regulations by the court below is erroneous, and that they were only intended to give the employee a right to cease from work on the night succeeding an all-night watch, and were never designed or intended by the Treasury

Department as an authorization for extra or additional pay. But we are now dealing with the construction placed upon these regulations by the court below, and we say that if the construction of the court below is correct, then the regulations are hopelessly in conflict with the above-cited statutes, and are consequently null and void.

The word "day" as used in a statute universally means a calendar day unless restricted to a less period of time by the statute itself. This fact is admirably expressed in the case of *Benson* v. *Adams* (69 Ind., 353–356), where it is said:

> A day is the unit of time. It commences at 12 o'clock p. m. and ends at 12 o'clock p. m., running from midnight to midnight. In the division of time throughout the world we believe this is regarded as the civil day. When the word "day" is used in a statute or in a contract it means the twenty-four hours and not merely the day as publicly understood from sunrise to sunset or during the time the light of the sun is visible. The fractions of a day in statutes or in legal proceedings or in contracts are not generally considered; but when the rights of parties depend upon precedence of time in the same day or upon a given hour or fraction of it, it may be alleged or proved (citing cases). But unless the meaning of the word is in some way restricted, it will be held to include the twenty-four hours.

And this doctrine has received the sanction and approval of the Court of Claims (*Post* v. *The United States*, 27 C. Cls. R., 244, 256, 257), where it is held that when Congress used the word "day" in a statute like section 2733 of the Revised Statutes it means the ordinary cal-

endar day. Any other doctrine would result in a complete nullification of the intent of Congress and put into the hands of the heads of Departments the power to regulate the salary of employees pretty much as they please. The Congress has by law declared that a night inspector shall not receive a compensation of more than $3 per day for the days of actual service, and has further declared that the Secretary of the Treasury shall not have the power to increase that salary more than $1 per day. If, now, it is to be held that the Secretary of the Treasury has the right to create an arbitrary definition of the word "day," and to divide it into two or four or six periods, manifestly he has the right to raise the salary of an inspector twice, or thrice, or four times above the rate provided by the Congress. It is a very easy thing to do if the definition of the word "day" is to be left exclusively in the head of the Department, and if he has authority to promulgate a regulation dividing a day into any given number of hours then he has only to provide that a day shall be divided into a given number of watches, and by giving his employee an opportunity to serve during all of the watches he has the opportunity to pay such employee for the performance of two, or three, or four, or any other given number of days' work within one day, and thus to increase the expenses of the Government at his pleasure. If it be conceded that the head of a Department, from humane considerations or motives of policy, has the power to accept *less* than a day's work as a discharge of an employee's obligation to perform a *full* day's work, it does not follow that he can

make two days out of one and pay his employee for two *full* days' work when the employee only performs two *half* days' work. If he may be generous to his employee, he must also be just to the Government. In the construction of statutes the intention of the legislature is always the predominating feature of interpretation, and we submit that the intention of the Congress in this case is perfectly plain upon the face of the statute, and that the construction placed upon these regulations by the court below is plainly in violation of that intention.

But not only is the construction placed upon these regulations by the court below in violation of the sections of the Revised Statutes to which we have referred, but equally in plain violation of other provisions of the law. For example, section 1764 of the Revised Statutes provides that—

> No allowance or compensation shall be made for any extra services whatever which any officer or clerk may be required to perform, unless expressly authorized by law.

Section 1765 of the Revised Statutes declares:

> No officer in any branch of the public service or any other person whose salary, pay, or emoluments are fixed by law or regulations shall receive any additional pay, extra allowance, or compensation in any form whatever from the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation therefor explicitly states it is for such additional pay, extra allowance, or compensation.

The act of June 20, 1874, section 3 (18 Stat. L., 109), provides:

> No civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond such salary or compensation allowed by law.

Thus it will be seen that in all relations between the Government and its servants it has been the constant effort and intention of Congress to prevent in any manner whatsoever the incurring of any expense for salaries, emoluments, fees, labor, or service of any kind whatsoever beyond the amount expressly authorized by Congress. These statutory prohibitions, clear and distinct in themselves, have entered into and become a part of every contract of employment between the Government and every individual who serves it, whether high or low, and to the extent of their terms they are the supreme law of the land, above all departmental regulations, above all contracts, even, in violation of their provisions, binding alike upon the individual employed, upon the person who employs him, and upon the judiciary whenever called upon to interpret the contract of employment. They are not alone prohibitions addressed to the employee, for they are passed as well to prevent executive officers of the Government from imposing additional and unforeseen expenses upon the Treasury by employing any of their subordinates either for extra time or for extra or unusual work. They are part of the settled policy of Congress to regulate and control by specific provisions of

law the contracts of the various Executive Departments, and if the door were once opened it would be impossible for this ever to be accomplished by any appropriation bills specifying the rates of compensation of specific officers. It would be impossible at any given time to arrive at an estimate of the expenses of the Government; it would be impossible to frame a revenue law to meet the expenses of the Government, for nobody would ever be able to say what the expenses of the Government would be for any given period of time. This purpose and intent of the Congress was enforced by this court in the case of *Mullett* v. *The United States* (150 U. S., 566–570), where Mr. Justice Brewer, for the court, after reciting the provisions of the statutes which we have just quoted, says:

> Obviously the purpose of Congress, as disclosed by these sections, was that every officer or regular employee of the Government should be limited in his compensation to such salaries or fees as were by law specifically attached to his office or employment. Extras, which are such a fruitful subject of dispute in private contracts, were to be eliminated from the public service.

And the same doctrines are announced and adhered to in the case of *Hoyt* v. *The United States*, 10 How., 109; *Converse* v. *The United States*, 21 How., 463; *United States* v. *Shoemaker*, 7 Wall., 338; *Stansbury* v. *The United States*, 8 Wall., 33; *Hall* v. *The United States*, 91 U. S., 559; *United States* v. *Brindle*, 110 U. S., 688; *United States* v. *Saunders*, 120 U. S., 126; *Badeau* v. *The United States*, 130 U. S., 439–451; *United States* v. *King*, 147 U. S., 676, in which latter case most of the former cases

were reviewed, and in which it was held that a clerk of a circuit court is not entitled to compensation for services in selecting juries in connection with the jury commissioner, there being no statute expressly authorizing such compensation.

We therefore submit that these regulations of the Treasury Department—if they are to bear the construction which the Court of Claims has put upon them—are hopelessly in conflict with the law, and therefore, even if they could be regarded as an express promise to pay a rate of compensation higher than that provided for in the statutes, such promise would be without authority of law, and nul and void. Such was the express decision of this court in the case of *Stansbury* v. *The United States* (8 Wall., 33). In that case there was a written promise on the part of the Secretary of the Interior to pay a certain clerk in that Department compensation additional to his regular pay as a clerk for services performed by said clerk at the special instance and request of the Secretary of the Interior in and about the preparation of an exhibit by that Department at the London, England, Industrial Exhibition. But the court held that the Secretary of the Interior mistook his power, and that he possessed no authority to make a written promise to pay this employee any sum in addition to his regular pay because of the very act which we have quoted above, to the effect that no officer of the Government shall receive additional compensation for any service unless expressly authorized by law.

The court below was exceedingly doubtful whether these regulations were not in conflict with law, and

gravely doubted whether the Secretary of the Treasury had the authority to pass them. The court said (Rec., p. 11):

> It is these provisions of the regulations which form the groundwork of the court's opinion and which distinguish this case from all other cases; that is to say, from all cases seeking additional or extra pay. Whether these regulations are authorized by law may well be doubted. But having been enforced for a number of years and in operation in every port of the United States, except the port of Baltimore, and having received the tacit, if not express, approval of Congress, this court does not feel at liberty to disregard them and hold that they are not authorized by law.

The court below does not inform us by what process of reasoning it infers that these regulations of an Executive Department ever met with the tacit if not express approval of the Congress. We are not cognizant of any method by which these regulations can be said to have met with any sort of approval from the Congress, unless it be inferred from the fact that Congress has passed general appropriation bills for the payment of the salaries of these inspectors. But certainly it can not be contended that any such regulation as this was known to and approved by Congress from the mere fact that it passed an appropriation bill to pay the salaries of inspectors. When an Executive Department makes up its estimates and sends them to Congress asking for an appropriation, it does not inform the Congress of the particulars for which that appropriation is desired, nor

does it inform the Congress of all of the rules and regulations in force in that Department, and it certainly seems to us that it is stretching the judicial imagination to say that an unlawful regulation of a Department became known to and acquiesced in by the Congress from the mere fact that the Congress passed appropriation bills to pay for it. There is nothing in this case to show that the Congress as a body, or any committee thereof, or any member thereof, ever had any actual or constructive notice that any regulation of an Executive Department had been made which gave to an inspector $6 per day instead of $3, and we doubt not that if the Congress were informed of the fact to-day, they would be surprised, and that if they were charged with an acquiescence in such a rate of pay, they would repudiate it. It seems to us that it is the plain duty of the courts to enforce the law as they find it upon the statute books, and not to imagine or to infer that it is something else because the Congress has passed an appropriation bill for a greater amount. If the regulation of the Executive Department is contrary to the law as it stands upon the statute books, and if the Secretary of the Treasury was without authority of law to promulgate the regulation, then we submit that it is the plain and mandatory duty of the courts to say so, plainly and unmistakably, leaving whatever action the Congress may desire to take in the premises to be taken by that body, unhampered by any advice or charge of constructive acquiescence from the courts.

VI.

THE CONSTRUCTION PLACED UPON THIS REGULATION IS ERRONEOUS.

We submit, however, that the construction placed upon this regulation by the court below is erroneous. The regulation was not designed or intended as a groundwork upon which to build a claim for extra or additional pay. The regulation merely provides that the night watches shall be divided in two, and that if an inspector is required to perform both watches in a given night, that he may be excused from performance of duty on the following night. It also provides that the surveyor of the port shall have power to regulate and determine the hours of these watches. The regulation, therefore, even if it could be regarded as a binding statute, even if it should be looked upon as a law, could not properly be interpreted to mean that a violation of its provision would carry a right of additional pay. The regulation does not provide for anything more than a rest or holiday, or a right to cease from work on a night succeeding that on which the inspector was required to work all night. If he were not given his holiday as provided by this provision, this violation of the law would not carry with it a right to demand pay for such violation. This view of the law has met with the approval of the Court of Claims in numerous instances. Two typical cases are worthy of consideration in this connection. The first is that of *Harrison* v. *The United States* (26 C. Cls. R., 259). In that case the law provided that certain employees of

the Government should have certain leaves of absence without loss of pay. The superior of the claimant required him to work on certain of the days on which he was entitled to be idle, and he sought to receive compensation for those days. The analogy is exceedingly close to the case at bar, where by regulation it was provided that if the appellee worked all of one night he should be entitled to a vacation the following night, and because he was not accorded such vacation he now demands pay for the day n which he was entitled to be idle, but for which he been paid his statutory $3. In neither case did the aw or regulation provide that the claimant should be paid extra, but merely that he need not work. The Court of Claims had no hesitation whatever in deciding that Harrison, by a statute which entitled him to certain days of vacation, was not exempted from the prohibitions of the statutes which we have cited above, and given compensation in case he worked on such vacation days. The suggestion in the opinion of the court below that this case of Harrison is distinguishable from the case at bar because the claimant here received no monthly or yearly stipend but only daily pay, must have been an oversight. Harrison was employed for no term; his pay was per diem. Indeed, on that branch of the comparison the closest identity exists between Harrison and the appellee. But how can it be said that a man whose employment in fact lasts for four years and three months is not employed by the month or year, and is not, as every other employee, removable at the will of his superior? The fact that the compensation

of one is mentioned per day and another per month or per year can make no possible difference. (See *Grissell* v. *Noel*, 19 Ind. App., 258–261, and cases cited.) The Court of Claims had no hesitation in Harrison's Case in transposing $3.20 per day into $998.40 per year, and it is difficult to see how such hesitation to do the same thing was brought about in the case at bar. The court, in Finding I (Rec., p. 5), has found that the appellee was appointed by the collector of the port of Baltimore. But in view of the statutes it would seem that this is error, for we take it that the statutes provide that these officers are to be appointed by the Secretary of the Treasury (see Rev. Stat., secs. 2605, 2606, 2607, 2733, and 2737), and of course if they are appointed by the Secretary of the Treasury, they are not mere employees of the Government but are officers of the Government, this court having repeatedly held that where an employee receives his appointment from the head of a Department he thereby becomes an officer of the United States. (*United States* v. *Germaine*, 99 U. S., 509–510; *United States* v. *Mouat*, 124 U. S., 303–307.)

And the permanent character of these inspectors is further evidenced by the fact that they are required to take an official oath. (Rev. Stat., 2616.) This being true, the statutes which we recited in the early part of this brief are strictly applicable to inspectors of customs, and no distinction can be drawn between the case at bar and the decisions of this court under those statutes already cited.

The next case which is worthy of notice in this connection is that of *Martin* v. *The United States* (94 U. S.,

400), in which this court reverses the holding of the court below. In that case Martin was required to work considerably in excess of eight hours per day, although the law in that case, as the regulation in this case, had fixed eight hours of labor as a day's work. His rate of compensation was $2.50 per day. A suit for compensation for the time worked in excess of eight hours was instituted. There the court said that the statute fixing eight hours as a day's work and prohibiting the employment of laborers and others a longer time, was a direction from a principal to its agent, a direction to the officer of the Government, and while it might clearly prohibit them from requiring more than eight hours' labor and might entitle the employee to refuse to work more than eight hours, it nowhere conferred upon him exemption from the distinct prohibitions of the statute law, to which we have already called the attention of the court. That case is quite as strong as the case at bar, for there the limitation of the day's work was by law certainly of more force than the departmental regulation which is invoked in the case at bar. The distinction which the court below seeks to make between the case at bar and Martin's Case, supra (Rec., p. 12), is, it seems to us, untenable. The court below distinguishes the two cases, because in that case Martin claimed additional compensation for extra time where such additional compensation was prohibited by law, but that in the case at bar the claimant has done two days' work and been paid for only one. The court holds that the regulation of the Department was the law of the case, and although they doubt again

the authority of the Secretary of the Treasury to pass such a regulation, do not care to disturb it because of the presumed acquiescence of the Congress. This begs the question. If the statute in Martin's Case fixed a day at eight hours, and Martin was compelled to work sixteen hours, then is it not true, from the reasoning of the Court of Claims, that Martin worked two days and was only paid for one? The difference is a mere difference in phraseology, and has no inherent force whatever. If the statute in the Martin Case fixed the day at eight hours, and Martin was compelled to work twelve hours, then he performed a half day's labor for which he was not paid. Why can it not be said that Martin performed a day's labor, or a part of a day's labor, or half of a day's labor, for which he was not paid as well as the appellee in the case at bar? To undertake to distinguish the one from the other by calling one case a claim for extra compensation, and the other case the performance of a day's work for which no pay was received, is to make a mere difference in phraseology without any valid distinction. In the case at bar, the claim is as much for extra or additional compensation as was the claim in the Martin Case. The facts are identically the same. If the regulation of the Treasury Department is to be regarded as a law, then it limited a day's labor as effectually and completely as did the eight-hour law in the Martin Case, and while it gave the appellee a right to a vacation on the succeeding night, it did not give him a right to claim pay for that time any more than the eight-hour law gave Martin that right.

To the same effect, see:

Grisell v. *Noel* (9 Ind. App., 251, 258–261).
McCarthy v. *Mayor*, 96 N. Y., 1.
Schurr v. *Savigny*, 85 Mich., 144.
Luske v. *Hotchkiss*, 37 Conn., 219, 220, 221.
Brooks v. *Cotton*, 48 N. H., 50.
Averill v. *United States*, 14 Ct. Cls., 200, 204, 208.
Helphenstine v. *Hartig*, 5 Ind. App., 172.
Bartlett v. *R. R. Co.*, 82 Mich., 658.
Koplitz v. *Powell*, 56 Wis., 671.
R. R. Co. v. *McNight*, 15 Lea (Tenn.), 336.

Besides, if this regulation of the Department is to be regarded as a *law*, then it is *in pari materia* with the various statutes to which we have above referred, and, under a familiar rule of statutory interpretation, must be construed together and made to harmonize with them. (*United States* v. *Healey*, 160 U. S., 136, 147; *Frost* v. *Wenie*, 157 U. S., 46, 58.) It can not be regarded as an implied repeal and must receive such an interpretation as will harmonize it with previous laws. This can only be done by giving it the meaning for which we contend. Any other interpretation brings in into hopeless conflict with the statutes above quoted.

On this branch of the case we therefore submit these alternative propositions: (1) Either that the regulations of the Treasury Department (if they are to receive the construction placed upon them by the court below) are in conflict with and in violation of the statute law of the land, and are therefore null and void regulations upon which no liability can be predicated; or (2) that the said

regulations of the Treasury Department can not be construed as giving to the appellee a right to any extra or additional compensation over the statutory pay of $3 per day, and that the refusal to give him a holiday upon the night succeeding an all-night watch carried with it no liability for the payment of extra compensation for such violation. In either event it follows that the judgment of the Court of Claims must be reversed, with instructions to dismiss the appellee's petition.

VII.

THE COURT BELOW ERRED IN REFUSING TO INSERT THE TREASURY REGULATIONS OF 1884 IN ITS FINDINGS OF FACT OR ELSE IN INSERTING THOSE OF 1874 AND IN FOUNDING A JUDGMENT THEREON.

The third and fifth assignments of error are to the effect that the court below erred in refusing to grant the request of the appellants as set forth in Finding X (Rec., p. 14), wherein the defendants request the court to find that the regulations set forth in Finding VIII continued in force until July 1, 1884, when other regulations were adopted which contained no provision concerning the division of watches into two watches, or providing that if an inspector should be required to work all night that he would be excused from duty on the following night. The court refused to make such finding as prayed for by the appellants for the reason that the court was of opinion that the regulations of an Executive Department founded upon law were not matters of evidence. This is certainly a most peculiar decision

on the part of the court below, for it will be observed that their whole opinion is based upon the regulations of the Executive Department of 1874, and that they are set forth *in extenso* in Findings VIII and IX. And it is upon these regulations that the judgment of the court below was had in favor of the appellee. Certainly if the regulations of 1884 are not matters of evidence then the regulations of 1874 are equally not matters of evidence, and it follows that the judgment of the Court of Claims was rendered upon evidence which was not properly before the court. In either aspect of the case, therefore, the court below has committed reversible error. If the regulations of an Executive Department founded upon a law are to be received as evidence in the court below, then the court erred in refusing to incorporate in its findings the regulations of the Department made in 1884.

If, on the other hand, such regulations are not proper matters of evidence, then the court erred in setting out in Findings VIII and IX the regulations of 1874, and in receiving the same as evidence upon which to base a judgment against the appellants. The decision in Finding X (Rec., p. 14) is hoplessly in conflict with Findings VIII and IX and hopelessly in conflict with the opinion of the court. Two contrary propositions may both be false, but they can not both be true; and it follows with unerring certainty that the court has committed reversible error either in Finding X or in Findings VIII and IX.

We are not advised whether this court will take judicial cognizance of the regulations of an Executive Department printed and promulgated by that Department. If it will not, and the court should be of opinion that the

regulations are properly receivable by the court below as a matter of evidence, then it follows that the judgment of the court below must be reversed, with instructions to the court below to receive from the appellants and incorporate in its findings the Treasury Regulations of 1884, in order that the appellants may present to this court the question whether the regulations of 1884 superseded and annulled all previous regulations. If, on the other hand, this court will take judicial cognizance of the regulations of an Executive Department printed and promulgated by it, we offer the same to the attention of the court *dehors* the record, and proceed to the next assignment of error.

VIII.

THE COURT BELOW ERRED IN HOLDING THAT THE REGULATIONS OF 1874 CONTINUED IN FORCE AT ANY TIME SUBSEQUENT TO MARCH 24, 1883.

In the second assignment of error, we submit that the court below erred in giving any force or effect to the Treasury regulations of 1874 subsequent to March 24, 1883, for on that date a new set of Treasury regulations were promulgated which expressly repealed all prior inconsistent regulations, as witness the following order contained therein:

> TREASURY DEPARTMENT,
> Document, No. 401.
>
> TREASURY DEPARTMENT,
> *Washington, D. C., March 24, 1883.*
>
> The subjoined compilation of laws, Department regulations, and decisions relating to the duties of

inspectors, weighers, gaugers, and measurers of customs is published for their information and guidance.

These officers are expected to make themselves familiar with their several duties as prescribed herein, and in the performance of such duties to conform strictly to the provisions of these regulations. Any neglect or inattention to duty or violation of law or regulation will subject the offender to suspension or removal from office.

All regulations and instructions heretofore promulgated that are inconsistent or in conflict with these regulations are hereby rescinded; and all questions relating to the construction of any law or regulation herein contained, or any question as to the course to pursue in cases not provided for herein, must be submitted to the surveyor, or, if there be no surveyor, to the collector of the port for his decision.

H. F. FRENCH,
Acting Secretary.

Turning now to the provisions concerning night inspectors (p. 127, Arts. 407, 408, 409, which are set out in full in Finding IX, Rec., pp. 6 and 7), we find that the provision concerning the division of the night into two watches *has been entirely omitted*, and that on the blank reports, called "catalogues," on which the inspectors were required to make their reports, the hours of duty are *left blank on both sides*, whereas those previously existing had the hour printed as from — o'clock p. m. to 11.30 o'clock p. m., or from 11.30 o'clock p. m. to — o'clock p. m., thus clearly indicating that the hours of duty should thereafter be left *entirely* with the surveyor

and with the captain and lieutenant of the watch, as provided in articles 407, 408. (Compare the blank reports under the regulations of 1883 with those under the regulations of 1874, as found on p. 7 of Record.)

It is true that the provision authorizing the excuse from duty on a night following an "all-night charge" is retained in the regulations of 1883, but that provision can not be made the basis of a judgment, for the reason that the appellee has already been paid his full statutory or contractual pay (vide *Schurr* v. *Savigny*, 85 Mich., 144, 149, 151, quoted *ante*); nor does the court rest its opinion on such ground, but on the ground that the night was divided into *two* watches, and that when the appellee was required to perform duty on both he was being required to do *twice* as much work as his contract called for, and hence should receive twice as much pay. When, therefore, this provision was repealed and ceased to exist, the entire foundation of the judgment of the court below was taken away. It follows, therefore, that from and after this repeal there ceased to exist any liability on the part of the appellants, even under the doctrines announced by the court below. Hence, the judgment should have been from April 1, 1882 (date of employment), to March 24, 1883 (date of repeal), or 723 nights, less 144 nights barred by the statute of limitations, and less 255 nights on which he received pay but performed no duty (see Rec., p. 10, bottom; and p. 11, top), leaving 324 nights, at $3 per night, amounting to $972. Any judgment in excess of that sum is erroneous.

IX.

THE COURT BELOW ERRED IN GIVING ANY FORCE OR EFFECT TO THE TREASURY REGULATIONS OF 1874, SUBSEQUENT TO JULY 1, 1884.

This point is covered by our fourth assignment of error. Even if it could be held that the regulations of 1874 were not repealed by those of 1883, as contended above, they were certainly repealed on July 1, 1884, when the new regulations were adopted and promulgated, which *entirely omitted* the provisions of 1874, both as regards the division of the night into two watches, and as regards excusing a night inspector from service on a night following an "all-night charge." These regulations are as follows (Art. 1434, p. 562):

> Night inspectors are appointed for the purpose of preventing smuggling. They are required to keep a vigilant watch over the vessels, stores, or merchandise whose custody is committed to them, in order to prevent the landing, between sunset and sunrise, of any merchandise from any vessel, unless the same is done by proper authority and under the supervision of a day inspector, and to protect the bonded stores and merchandise from robbery or the unlawful removal of the merchandise therefrom, or from any wharf or place on which the same may be deposited. (Surveyor's Regs., 127.)
>
> Whenever cargo is being discharged from any vessel at night under the supervision of an inspector, the night inspector assigned to such vessel will not interfere with such landing so long as the inspector is present in charge thereof; but night inspectors are authorized to demand to see, and the inspector is

required to exhibit, the night permit for the working of the vessel. (*Ibid.*)

If merchandise is landed from a vessel when no inspector is present, the night inspector will stop the landing and report the fact next day to the surveyor or other proper officer. (*Ibid.*, 128.)

Coal, ballast, or cargo may be taken into a vessel at night in the absence of the inspector, but the permit to do so must be exhibited to the night inspector. (*Ibid.*)

Night inspectors are required to stop any person or persons who may leave the vessel, store, or warehouse in their custody; and if they have reasonable cause to suspect that such person or persons are attempting to smuggle any merchandise they will examine such person or persons, and any package of any kind in his or their possession. (*Ibid.*)

Searches of suspected persons should, if possible, be made in the presence of another officer or a citizen. (*Ibid.*)

Night inspectors are directed to question any person who may attempt to go on board of the vessel to which they are assigned in the night, and to satisfy themselves that such person has the right or may properly be allowed to go on board. (*Ibid.*)

They are required to keep a strict watch upon any small boat which may come to or near any wharf or any vessel at which they are assigned, and to take all necessary precautions to prevent smuggling by such boats. (*Ibid.*)

Night inspectors have the right and are required to arrest any person or persons in the act of smuggling foreign merchandise, and to call for the assistance of the police or of citizens to aid them in so doing, and to seize, take possession of, and secure

any merchandise which has been smuggled or landed illegally from any vessel during the night. (*Ibid.*)

At ports where captains and lieutenants of night inspectors are appointed, they shall assign the force to duty and make daily reports of such assignments, together with any negligence, absence, or misconduct.

They shall see that the night inspectors perform the duties assigned to them, that all seizures and arrests are promptly reported, and that the orders of the surveyor are obeyed.

Nor are we left entirely to implication or the entire absence of the previous provisions to show that they were superseded, annulled, and repealed by these latter regulations. This *intention* is clearly expressed in Department letter promulgating the regulations of 1884 and prefixed to the printed volume. It is as follows:

TREASURY DEPARTMENT,
Document No. 552.
Secretary's Office.

TREASURY DEPARTMENT,
Washington, D. C., July 1, 1884.

This volume of revised regulations is promulgated for the information and government of public officers.

The instructions for the revision were issued on the 10th of January, 1884. Among those instructions were the following:

"The order and arrangement of the volume of 1874 will be preserved, so far as practicable, for the convenience of those familiar with it.

"The language of each article will be retained *verbatim*, except where a change is made necessary by some statute, decision, or circular, to the end that

settled constructions of language may not be disturbed. *Substitutes for existing regulations will take their place*, but new regulations not substitutes for old ones will be placed at the end of the division or subject.

"Provisions of the Revised Statutes, or later statutes in force on which a regulation is based, will be cited—the Revised Statutes by sections, later statutes by year, volume, page, and section. Decisions and circulars will also be cited—decisions, S., with number; circulars by date and number."

The work has been stereotyped and printed as fast as the several parts could be prepared in their order, and attention is therefore called to any instructions issued since January 10, 1884, changing the regulations.

Collectors at the principal ports are instructed to set apart one copy of this work, to be known as the "standard copy," which will be corrected by the addition thereto of all orders and instructions which affect these regulations, or by references thereto. Such "standard copy" will be turned over by each retiring officer to his successor as a part of the public property in his charge.

CHAS. J. FOLGER, *Secretary.*

It will be observed that the new regulation concerning night inspectors "takes the place" of the former ones, and hence by the terms of the foregoing letter is meant to be a "substitute for existing regulations," since it "takes its place" and is not "placed at the end of the division or subject."

A regulation of a Department can only be considered as having binding force as long as it expressly exists. It

is entirely competent for the head of a Department to discontinue that regulation in any way that he sees fit, and we submit that to promulgate subsequent regulations is made to that provision of the old regulations to the effect that night watches should be divided into two watches of as nearly equal length as possible, and that where an inspector was required to perform an all-night watch he would be excused from duty on the succeeding night.

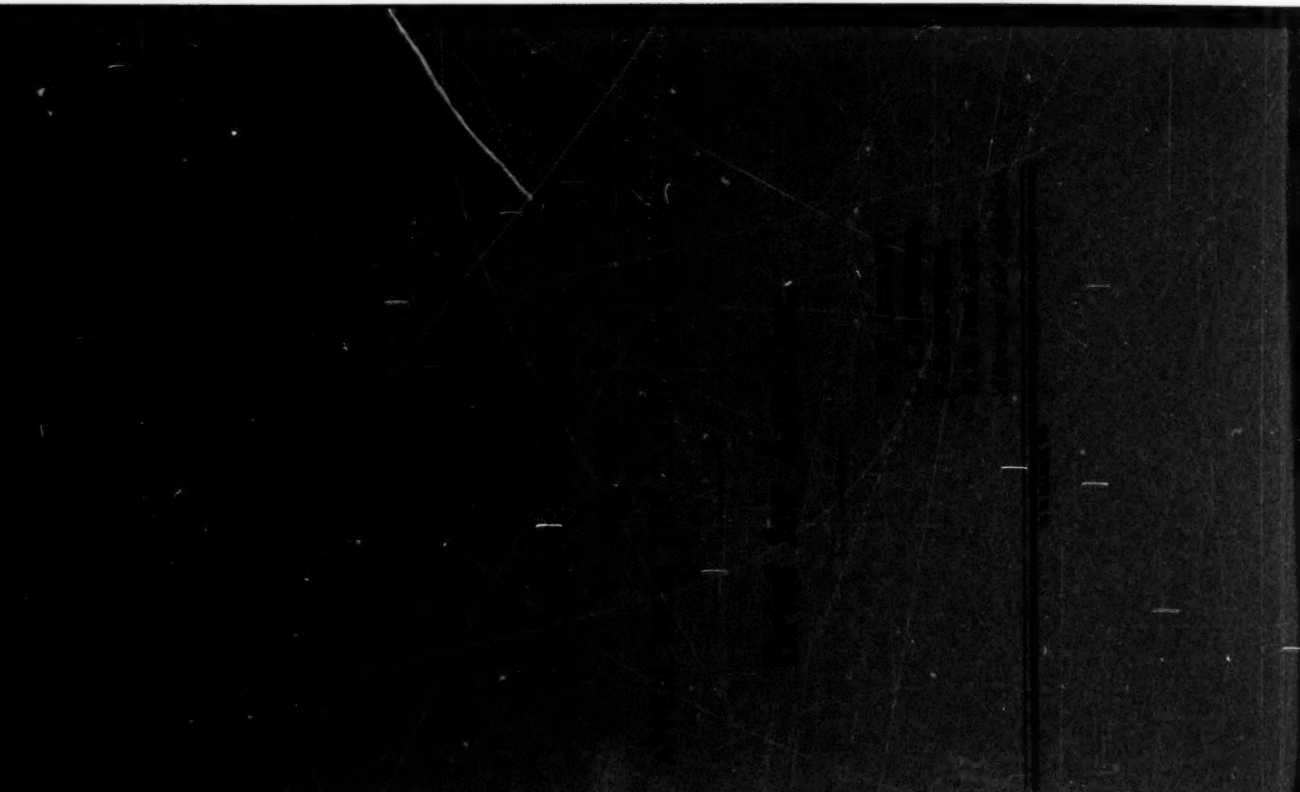
to repeal the former regulations inconsistent therewith

We therefore submit that the judgment should not have been for nine hundred and fifty-four nights, or in the sum of $2,862, but should have been only for the nights between August 24, 1882, and July 1, 1884, when the aforesaid provision ceased to be in effect; or, in other words, judgment should have been for six hundred and seventy-two nights, less two hundred and fifty-five nights, when claimant performed no duty but received pay, making a total of four hundred and seventeen nights, at $3 per night, amounting to $1,251. (See Finding X, Rec., p. 14; see also Record, p. 10, bottom, and p. 11, top.)

Upon the whole case we therefore submit, (1) that the judgment of the Court of Claims should be reversed, with instructions to dismiss appellee's petition; or (2) that the judgment of the Court of Claims should be reversed for error committed in the tenth finding of fact, and that the same should be returned to the Court of Claims with instructions to embrace in the findings of fact the regulations of the Treasury Department made in 1884, as prayed for by the appellants in Finding X; or (3) that the court should reduce the judgment to $972,

as set out in the second assignment of error; or (4) that the court should take judicial cognizance of said regulations of 1884, and reduce the judgment of the Court of Claims to the sum of $1,251, as above set forth.

LOUIS A. PRADT,
Assistant Attorney-General.
GEORGE HINES GORMAN,
Special Attorney.



IN THE

Supreme Court of the United States.

THE UNITED STATES,
Appellant,

vs.

DIXON N. GARLINGER.

No. 166.

Statement and Brief of Argument for Appellee.

STATEMENT.

The appeal in this case is taken by the United States, defendants in the Court of Claims, (No. 16,312) against whom judgment was rendered on the 18th of March, 1895, in favor of the Claimant (reformed November 25, 1895) for $2,862. (Trans. 13.)

A motion in behalf of the United States for a new trial was disallowed on the 25th day of November, 1895. (Trans. 4.)

A subsequent motion for a new trial in behalf of the United States, filed March 19, 1896, was overruled, but an additional Finding of Fact was found (Trans. 14).

Dixon N. Garlinger, the Claimant, was appointed night inspector at the customs port of Baltimore and took the oath of office April 1, 1882. He entered upon the discharge of his duties at that time and so continued until August 25, 1886.

For his services during that period he was entitled to be paid $3 per day for every day he was actually employed. (R. S. 2733 and 2738.)

During 1353 days of his term of service he was required to perform dutyas night inspector from sunset to sunrise and until relieved by the day inspector; the length of time consequently varying, and sometimes extending from 5 P. M. of one day until 10 A. M. of the following day; being required to perform two watches (the night being divided into two watches) without being relieved from duty the following night, as required by regulations of the Secretary of the Treasury, hereinafter referred to, and except as stated in the Findings of Fact. (Finding III, Trans. 5).

Prior to, at the time, and since the time he entered into service, the following regulations were in force and were, *inter alia*, handed to 'him for his guidance:

> "ART. 420. The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches.
>
> "Whenever it is necessary to assign a night watchman to a vessel, or to any other 'all-night' charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night.
>
> "Night watchmen must not quit their charge on being relieved without first making their presence personally known to the officer relieving them. Night watchmen, when on duty, must wear their official badge."

These regulations were contained in "Laws and Regulations" for the government of officers of customs under the superintendence and direction of Surveyor of Ports (1877) issued by the Secretary of the Treasury to the Custom House authorities of all the ports, including the port of Baltimore, and were in operation in all the principal ports, except Baltimore, in which the practice of the ports at the time of claimant's appointment was not, and had not been, in accordance with the requirement of the regulations making two night watches and relieving the first night watch at midnight. (Findings VII and VIII.)

The "Laws and Regulations for the Government of Customs Inspectors, Weighers, Gaugers and Measurers," etc., (1883) do not specifically require the division of the watches, but Sec. 408 contains *inter alia*, the following provision:

> "Whenever it is necessary to assign a night ihspector to a vessel, or to any other 'all-night' charge, the night inspector so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night." (Finding IX.)

During the period of Appellee's employment he was paid for 1608 days, at $3 a day, of which 1353 payments were for night service, when he was present rendering actual service, and 255 were for night service, when he was absent and off duty. (Finding II.)

One hundred and forty-four days were barred by the statute of limitations. (Finding IV.)

The Court deducted from 1353 days of night service the 255 days he was off duty, leaving 1008 nights in which he served both the first and second watches, without being relieved from duty the following night. From this last amount was deducted the 144 days barred by the statute of limitations, leaving 954 days at $3 per day, as the basis for the judgment of $2,862.

Subsequent to the judgment, the United States moved for a new trial on the ground that "General Regulations under Customs and Navigation Laws" (1884) contained no provision for separate watches for night inspectors and as a consequence prior regulations were repealed. The motions were overruled, but an additional Finding X was made. (Trans. 14.)

Argument.

The main question in this case is whether one watch of a night inspector, as fixed by the Regulations of 1877, Art. 424, (Finding VIII, Trans. 11) constitutes a day's work?

Is it a legal day's work by regulation?

Is it a day's work established by custom?

Is it a day's work established by legislative approval?

Regulations.

It is well settled that regulations issued by the head of an executive department, made in accordance with law, have the force and effect of law, are in fact law.

When Congress permits the order of the executive head of a department to be formulated as reg-

ulations and published, when so published and carried into effect, the legislative ratification must be implied. *Maddux case*, 20 C. Cls., 103; *Stotesburry case*, 23 C. Cls., 292; *Ex parte Reed* 100 U.S., 13; *Gratiot vs. U. S.*, 4 How., 80.

The Secretary of the Treasury, under and by virtue of Sec. 251, R. S.,

> "—has the power to prescribe rules and regulations, not inconsistent with law * * * in carrying out the provisions of the law relating to raising revenue from imports, or to duties on imports, or to warehousing," etc.

The regulations referred to, and quoted from in Findings VII and VIII (Trans. 5 and 6) were issued by the Secretary of the Treasury, formulated, published and carried into effect as "Laws and Regulations for the Government of officers of Customs under Superintendence and direction of Surveyor of the Ports." (See Regulations, 1877).

The regulations quoted from in Finding IX (Trans. 6 and 7) were also issued by the Secretary of the Treasury, formulated, published and carried into effect as "Laws and Regulations for the Government of Customs Inspectors, Weighers, Guagers and Measurers," etc. (See Regulations, 1883).

These regulations were in accordance with the law empowering the Secretary of the Treasury "to prescribe rules and regulations * * * in carrying out the provisions of the law relating to raising revenue from imports," etc.

One Watch By Regulation Constitutes A Day's Work Actually Performed.

The regulations of 1877 which, with those of 1883, remained in force during Appellee's entire service, directed that the night inspector force should be divided into two watches to perform duty every night—the surveyor of the port to appoint hours of duty.

When necessary to appoint an inspector to an all-night duty, then such inspector was to be relieved from duty the following night.

By such regulation, what constitutes a day's work is necessarily specified. His work is at night, and the duty imposed upon him is one watch at night. He is relieved from duty on the following night, when he is on both watches, on the ground that he has in one night performed two days' work. He is not required to work 24 hours. Men work under contract; in this case the regulations take the place of and *are* the contract. In the *Martin case*, 94 U. S., 400, this court held that the Government could contract for a day's work of more or less than 8 hours. It is true that this was decided in construing the "eight hour law," but it is a principle of general application.

The Court say in that case:

> "There are some branches of labor, connected with furnaces, foundries, steam or gas works, where the labor and the exposure of eight hours a day would soon exhaust the strength of a laborer, and render him permanently an invalid. The Government officer is not prohibited from knowing these facts, nor from agreeing, when it is proper, that a less number of hours than eight shall be accepted as a day's work."

It is well recognized in such employment that *two* days' work may be performed in the same 24 hours. A day is frequently divided into three "shifts" or periods of eight hours each, especially in mines and large factories. When a man works two "shifts," he is paid for two days' work.

Where a person is entrusted with an office, the Government is entitled to the time required and fixed for the performance of the duties imposed. If the employment is by the day, two days' work for one day's pay can with no more justice be required than two years' work could be required for one year's pay.

A man must perform the duties imposed by law and regulation. He may do other work, perform other duties, even hold another office, and be entitled to compensation or salary therefor, as well as for the salary attached to the original appointment. *Collins*, 15 C. Cls., 22; *Landrum*, 16 *id.*83; *Hedrick*, 21 *id.*, 451; *Bartolett*, 25 *id.*, 389; *Converse*, 21 How. 463; *Saunders*, 120 U. S., 126.

By Custom, Usage, and Departmental Construction, One Watch Constitutes a Day's Work.

The Laws and Regulations for the government of officers of Customs under the superintendence of the Surveyor of the Ports, of 1877, issued by the Secretary of the Treasury to the Custom house authorities of all ports, including the port of Baltimore, were in operation in all of the principal ports except Baltimore, in which the practice of the ports at the time of appellee's appointment was not, and had not been in accordance with the regulations making two night watches and relieving the first

night watch at midnight. (Finding VII, Trans. 5 and 6.)

Baltimore has always been regarded as one of the principal ports, and is so enumerated in the Statutes. In Sec. 2653, R. S., the following ports are named in contradistinction to subordinate ports, viz: Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and Portland in Maine.

In all the principal ports of the United States, one watch was and is regarded and paid for as a day's work. One watch was therefore, not only by regulation, but by custom and usage, regarded as a day's work, with the further custom and usage that, where all night duty was performed, the person so performing it was excused from duty the following night.

Whilst a custom or usage may not have the full force and effect of law, and must not be repugnant to established law, yet it is an aid in the interpretation of the law. *Barbecker v. Robertson*, 152 U. S., 373; *Maddock v. Mayone;* 152 U. S., 368; *Sage v. Wilcox*, 6 Conn., 81; *Dublin case*, 38 N. H., 512.

In the interpretation of the law or a contract, a usage need not be ancient. *Cole v. Skrainka*, 17 Mo., App. ,427; *Rindskoff v. Barrett*, 14 Iowa, 101; *Blin v. Mayo*, 10 *id.*, 36; *Parsons on Contracts*, 540.

It therefore follows that where, by regulations including Baltimore the performance of one watch is regarded as one day's work, the performance of two watches must be regarded as two days' work.

Were there any ambiguity in 261 R. S., as to the power of the Secretary of the Treasury to make the

regulations fixing a single watch as a day's work, the uniform construction given to the statute would control. This is so well recognized that it is not necessary to cite authorities.

The recognition of the rule or fact that one watch constitutes a day's work actually performed applies with as much force to Baltimore as to Boston, New York or Philadelphia.

That the same person should perform two watches and be paid for two day's work is immaterial. His honor, Chief Justice Nott, in this case (Trans. 10) says:

> "If the Government had employed two inspectors to do the work of two, and had given the inspectors on duty through two-night watches, the alternate nights of rest assured to them by the regulations, the result in money would have been the same, as that now reached in the decision of this case."

As further determining the usage of the Customs Department in fixing one watch as one day's service, the court is referred to Catalogue 916 (Trans.7).

This catalogue is found by the court as part of the regulations. It shows a division of the service in two watches. This blank was framed for all customs ports, including Baltimore. It was distributed to all ports, including Baltimore. It indicates general custom and usage. It is submitted that, independent of any other regulation on the subject, the issuance of such blank under the authority of 2646, R. S., is in itself an authorization that the night inspector force should be divided into two watches, and is in itself a regulation to the effect that one watch should be regarded as one day's work actually performed.

One Watch as a Day's Work has Received Legislative Approval.

Where regulations are formulated by order of an executive, published and carried into effect, the legislative ratification must be implied. *Ex parte Reed; Gratiot;* and other cases above cited.

Congress has for many years appropriated for the pay of inspectors, whose day's work was confined to one watch as one day's work, and where two watches were for any reason performed by any person, and he was released from duty the following night, for two days' work.

By regulations having the force of law, by custom and usage, and by legislative enactment, a single watch constitutes a day's work for a night inspector or watchman.

Pay.

The statute provides, and it is not a matter of dispute in this case, that the compensation or salary of Appellee as a night inspector was $3 a day. It was so fixed by law. (Secs. 2733, 2737, R. S.)

The failure to appropriate does not deprive Appellee of his legal right to payment. An employee of the Government is entitled to the salary allowed by law and is not limited by the amount appropriated by Congress. *Graham's case*, 1 C. Cls., 380; *Langston*, 118 U. S., 389.

Authorities Cited by Defendant in the Court Below.

In the Court below the defendant's attorney cited: *Harrison*, 26 C, Cls., 259; *Post*, 27 C. Cls., 259; and *Martin*, 94 U. S., 400.

That these cases have no application whatever in the present case is conclusively shown in the opinions of Chief Justice Nott. (Trans., pp. 10, 11, 12.)

It may be said, in addition to those very able opinions, that Harrison claimed payment for work he did not perform; Post for a day's work of eight hours whether he performed it or not, and in Martin's case it was held that the eight hour law did not deprive him of a right to contract for more or less than eight hours as a day's work. In the present case, the contract consisted of the regulations, and the custom and usage fixing one watch as one day's work.

Regulations of 1884.

General Regulations under Customs and Navigation Laws of the United States, 1884, are silent as to the hours of service of night inspectors.

The defendants in the court below contended that, by reason of the legislation of 1884, the Regulations specially relating to officers under the superintendance of the Surveyor of Ports were repealed, and being repealed one watch no longer constituted a day's work by regulation.

> The court found (Trans. 14), "It does not appear that the hours of service of night inspectors, or length of the night watches, were changed at any port of the United States subsequent to the promulgation of the 'General Regulations under Customs and Navigation Laws of the United States,' but on the contrary continued as set forth in Finding VII."

The court refused to find that the regulations referred to, and described in VII, VIII and IX Findings, were repealed.

The law does not regard the regulations of an executive department, made in pursuance of a statute, as a matter of evidence.

Such regulations have the force and effect of law —when formulated, published and acted upon are law—as any other law they may be cited, and when made in accordance with law are authoritative. *Caha vs. U. S.*, 152 U. S., 111.

As To Different Regulations.

There are several kinds of general regulations bearing upon the case at bar, which were considered by the court below.

One kind are "General Regulations under the Customs and Navigation Laws of the United States." These regulations are general in their character, but are specific in the enumeration of the *duties* of the customs and navigation officers. We cite as to the "General Regulations under the Customs and Navigation Laws" those of 1874 and 1884. One copy of such regulations is to be kept by each of the principal officers as the "standard copy," and is to be handed to his successor in office.

Besides these are what may be denominated pocket editions of general regulations for *governance* of officers under surveyor of ports. We cite as such the regulations of 1871, 1876, 1879 and 1883.

These are for the benefit and use of all officers. At the time Appellee entered upon his service as night inspector, he was furnished by his superior officers with a copy of the regulations promulgated by the Secretary of the Treasury for his *governance* and defining his duties. (Finding VI, Trans. 5.)

The regulations of 1877, relating to officers under direction of surveyors of ports, are substantially the same as those of 1871, so far as hours of service are concerned. But between 1871 and 1877, general regulations under the customs and navigation laws were promulgated by the Secretary of the Treasury, which were silent as to the special rules for the governance of officers under the superintendance of Surveyors of Ports.

The general plan of the regulations of 1884 follows those of 1874, and they were a revision of prior regulations. The General Regulations under Customs and Navigation Laws of both 1874 and 1884 are specific as to certain duties of night inspectors, but are silent as to governance. That the regulations of 1884 were not intended to supersede or repeal the specific regulations of 1883, as to what constituted a day's service of night inspectors, is evidenced by the action of the customs officer. The time of service was not changed, but on the contrary was continued through Appellee's term of office. (Finding X, Trans. 14.)

If regulations have the force and effect of law, and are in fact law, the rules of interpretation of statutes apply. When one statute is not specifically repealed by another they should be interpreted *pari materia*. The rule "that a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable," announced by Mr. Justice Story in *Hartford vs. The United States*, 8 Cranch, 109, has been strictly followed in numerous decisions of this Court. A general act is not to be construed

to repeal a previous particular Act. *Ex parte Crow Dog*, 109 U. S., 556; *State vs. Stoll*, 17 Wall, 425.

The court is referred to *Meyer vs. Western Car Co.*, 102 U. S., 1., in connection with the many familiar decisions relative to the construction of the Revised Statutes.

That the rules for the governance of night inspectors should be interpreted *pari materia* is as clearly established that one published set of rules only repeals prior rules to the extent that such prior rules are inconsistent therewith.

The "General Regulations" of 1874 do not define what constitutes a day's work for night inspectors. The regulations of 1871 for the governance of officers under surveyors of ports, fix a day's work as one watch. This rule, notwithstanding the general regulations of 1874, is followed in the specific regulations of 1876, 1877, and 1883. That the general regulations of 1874 were not held to repeal the regulations of 1871, when not inconsistent, is, it is submitted, abundantly proven, in connection with the facts that the same rule as to night watches was observed before and since 1884, and that the regulations of 1884 did not repeal or in any way change the regulations then existing as to the term of service of the night watch.

The Length of a Day's Work For a Night Inspector Does Not Necessarily Depend Upon a Written and Promulgated Regulation.

The law fixes the rate of a day's work for Night Inspectors. If the duration or length of the day is fixed by regulation made in accordance with law,

such regulation has the force and effect of law. In the case at bar, the rights of Appellee are established by both law and regulations.

But what constitutes a day's work may be proven by other evidence than laws or regulations.

In *Martin's case, supra*, the court based its decision, in part, on what was the ordinary custom and usage, both as to hours and payment of labor, both by the United States and private parties. The same rule is applicable here. Without taking into consideration the specific regulations directly pertaining to officials under the superintendence of surveyors of ports, the general regulations of 1874 and 1884 define the duties of all night inspectors. The character of such duties at all ports is the same—there is no distinction made. The rate of pay is established by law. The usage and custom as to what constitutes a day's work, in the absence of direct law or regulation, must control. Usage long established and followed has to a great extent the efficacy of law in all countries. *Sidell v. Grandijan*, 111 U. S., 412.

It is shown by Finding VII that one watch was recognized as a day's work in all the principal ports of the United States, and that the general directions of the Secretary of the Treasury applied to Baltimore.

Points in Appellant's Brief.

Specifically replying to points made in Appellant's brief, we submit:

1st. *That the Treasury regulations of* 1874 *did not constitute an express contract of employment.*

As before stated the regulations of 1874 are "General Regulations under Customs and Navigation Laws." These regulations are silent as to what constitutes a day's work for night inspectors. They apply more especially to his duties.

The hours of work, and what constitutes a day's work, are defined in "Laws and Regulations for the Government of Officers of Customs under the Superintendence and Direction of Surveyors of the Port, 1871 and 1877."

It is not contended that, as a general rule, acts fixing the salary of public officers may not be changed or repealed. But so long as they are unrepealed, the contract for payment of services performed remains in force. In *Butler v. Pennsylvania*, 10 How., 402, where the right of the legislature to change a fixed salary by subsequent law is affirmed, it is also declared, "the promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed."

An officer is entitled to the statutory salary although, during the continuance of his office, an appropriation is made for a less amount than that fixed by prior law. *U. S. v. Langston*, 118 U. S., 389. The cases are very numerous where suits have been prosecuted in the Court of Claims for salaries of public officers and in this Court considered on appeal.

A contract may be established by a statute. Whether such contract may be abrogated prospectively depends on circumstances. Treaty obligations with Indians, when prospective, may not be abrogated.

In the case at bar, what constituted a legal day's work was fixed by regulations having the force of law.

In *Adams v. U. S.*, 20 C. Cls., 117, the court says:

> "The law creates the office, prescribes its duties, and fixes the compensation. The selection of the officer is left to the collector and Secretary. The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it. This has been substantially decided in many cases.
>
> "(*Converse v. U. S.*, 21 How., 463; *U. S. v. Williamson*, 23 Wall., 411; *U. S. v. Lawson*, 101 U. S. R. 164; *U. S. v. Ellsworth*, 101 U. S. R., 170; *Hall v. Wisconsin*, 103 U. S. R., 5; *Allstædt's Case*, 3 C. Cls. R , 284; *Patton's Case*, 7 C. Cls., R., 362; *Sleigh v. U. S.*, 9 C. Cls. R., 369.)"

In the case at bar, the regulation fixing a day's work was not changed, altered or modified.

2nd. The Appellant's, under head 111, assert that *the facts in this case negative an implied promise to pay any additional sum beyond the statutory rate.*

Nothing is claimed beyond the statutory rate. The claim is made under R.S., 2733 and 2738. The pay is fixed at a *per diem* compensation. The regulations determine what is a day's work.

3rd. The Appellant claims (IV) *that even if there is a breach of contract, no recovery could be had beyond the sum allowed.*

The law fixes claimant's compensation at $3 per day. He is entitled to be paid for the number of days he worked. The failure to appropriate does not affect his right to pay for work actually performed. Nothing is claimed beyond the statutory rate.

4th. Appellant claims that *there is no obligation on the appellants arising ex lege, or quasi ex lege, because the Treasury regulations of* 1874, *if they are to receive the construction placed upon them by the court below, are in conflict with law, and null and void.*

The fact that 2737, R. S., permits the Secretary of the Treasury to increase the salary of inspectors to $4 per day and therefore a night inspector's salary should not exceed $4, has no bearing in this case. The same argument, if argument it is, would apply where the salary is limited to $3.

It all depends on what constitutes a day. As applied to a day's labor, a "day" in a statute does not mean 24 hours, or a calendar day. For mechanics, laborers and workmen, it means eight hours. For letter carriers it means eight hours. In *Martin's case, supra*, the number of hours that constitute a day's work depends upon the contract. It may be greater or less than eight hours. Adopting the rule in *Benson v. Adams*, 69 Ind., 353, that the day commences at 12 o'clock P. M. and ends at 12 o'clock P. M., then the night inspector worked each calendar day, the division of time being different, one day working from 5 P. M. to 12 P. M., and the next day from 12 P. M. to 7 A. M. It would be the equivalent of working each day from 9 A. M. to 4 P. M., and that might constitute a day's work under the decision in *Martin's case, supra.*

The claim here is for neither extra service, extra compensation, or perquisites; it is for legal day's work actually performed.

5th. Appellants claim that *the construction placed upon this regulation is erroneous.*

Harrison's case and Martin's case, supra, have been fully considered by the Court below. Harrison claimed pay for work he did not do, and Martin claimed pay for work included in his contract. The question here is entirely different. If one watch constitutes a day's work, and it is so fixed by regulations having the force of law, then the value of that day's work is fixed by law and claimant is entitled to be paid accordingly.

6th. Appellent claims that *the Court below erred in refusing to insert Treasury regulation of* 1884 *in the Findings of Fact, or else in inserting those of* 1874, *and in founding a judgment thereon.*

Regulations made in accordance with law are not evidence. They have the force and effect of law. Of regulations this court will take judicial notice. *Caha vs. United States*, 152 U. S., 111.

The Court below found parts of certain regulations pertinent to the issue, as facts.

The Appellant asked that the whole body of other regulations be found for the purpose of showing that they did not contain regulations quoted. Of them this court, if relevant, will take judicial notice.

The Appellants are again in error in stating that the present claim is founded on the regulations of 1874. Such regulations were not quoted in the Findings.

7th. Appellant claims that *the court below erred in holding that the regulations of* 1874 *continued in force at any time subsequent to March* 24, 1883.

Appellants are again in error. The regulations of 1874 contain no reference whatever to the hours which constitute a watch.

Regulations for the government of officers of customs were adopted in 1871. (See Regulations). These were substantially re-adopted in 1877. The General Regulations under the Customs and Navigation Laws were silent as to the governance of night inspectors. These rules were provided for another and different set of regulations.

In the different regulations there was nothing inconsistent with the general regulations, a copy of which was to be kept in the office of the collector of the port and handed to his successor.

The silence of the regulations of 1884 has no more effect on the regulations of 1883 for the government of custom inspectors, etc., (Find. IX., Trans. 6) than had the silence of the regulations of 1874 on the regulations of 1871, promulgated for the same purpose.

The regulations after 1883, as those prior thereto, were construed as authorizing two watches in the principal ports of the United States, so that where, for any reason, a party was required to perform all night duty; he was relieved from duty the following night. Baltimore was the exception where the regulations were not observed.

It being established by law, regulations, usage and custom, that eight hours constitute a day's work for a night inspector, it is respectfully submitted that the judgment of the court below should be affirmed.

W. W. DUDLEY,
L. T. MICHENER,
F. P. DEWEES,
R. R. MCMAHON,
Attorneys for Appellee.

No. 506. 166.
Motion Papers for Appellee.
Filed Nov. 2, 1896.

IN THE

Supreme Court of the United States.

THE UNITED STATES,
Appellant,
vs.
DIXON N. GARLINGER,
Appellee.
No. 506.

Comes now the appellee, and moves the Court to advance the above-entitled cause, and set it down for oral argument at an early date, for the following reasons:

1. The question of law involved in the case is one of very great importance to the officials of the Treasury Department, because it involves the right of night inspectors in the Customs Service to receive compensation for overtime services rendered by them, and the liability of the United States to pay them therefor.

2. Many cases of like character, originating in the City of Baltimore, are now pending in the Court of Claims, and will be governed by the decision of this Court. The speedy decision of this case will terminate the litigation in the cases now pending in the Court of Claims, or at least render their prosecution and defense less expensive to the claimants and to the United States if such cases are to proceed to final judgment.

3. The rules and regulations of the Treasury Department, relating to the pay of night inspectors, are observed in the principal ports of the United States, except in Baltimore. The above suit was brought on account of the discrimination against the night inspectors of Baltimore by the officials of the Treasury Department. If the judgment of the Court of Claims should be affirmed by this Court, then such discrimination will cease, and the rules and regulations of the Treasury Department, in respect to the services of night inspectors, will be enforced, doubtless, at the port of Baltimore as at other ports, thus doing justice to such inspectors and avoiding a multiplicity of suits which, there is every reason to believe, will otherwise be brought against the United States by such inspectors.

W. W. DUDLEY,
L. T. MICHENER,
F. P. DEWEES,
Att'ys for Appellee.

DISTRICT OF COLUMBIA, *ss:*

LOUIS T. MICHENER, one of the attorneys for the appellee in the above-entitled cause, being by me first duly sworn according to law, deposes and says that the statements of fact in the foregoing petition are true, as he is informed and verily believes.

LOUIS T. MICHENER.

Subscribed and sworn to before me this 24th day of October, A. D., 1896.

L. P. SQUIER,
Notary Public.

[SEAL.]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant.

vs.

DIXON N. GARLINGER,

No. 166.

PETITION FOR REHEARING.

W. W. DUDLEY,
L. T. MICHENER,
F. T. DEWEES,
R. R. McMAHON,
Attorneys for Appellee.

W. T. ELLIOTT, PRINTER

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES.
vs.
DIXON N. GARLINGER. } No. 166.

Petition and Argument for Re-hearing.

The Attorneys for the Appellee believe, and hereby certify that they are of the opinion, that this court erred in directing the dismissal of the petition in the court below.

We think this court has misunderstood the facts, owing perhaps to an insufficient explanation on our part of the significance of the ultimate findings of the court below. We are partly led to this conclusion by a statement in the beginning of the opinion, viz:

> "For services he was entitled to be paid $3.00 per day for each and every day's work actually performed, and it is a *conceded* fact that he was so paid for every day he was in the service."

We respectfully submit that such fact is not conceded. The statement is misleading. While it is true that claimant was "entitled to be paid for each and every day's work actually performed," it is not "conceded" that he was so paid "for every day he was in the service."

It is the claimant's contention that a day's work is fixed by regulation, and that it consists of "one watch." If this be true, then the claimant has not been paid for every day's work "actually performed," or for every day he was in the service.

If "two watches," one following the other, are only one day's work, then he has been paid too much. On the theory that "two watches," or the regulation work of *two men*, is only one day's work, the claimant has been paid, during the time included in this suit, $765 too much. His service from April 1, 1882 to August 25, 1886 covers a period of 1,608 days. Upon the theory that "double service" is, by regulation, single service, he was in fact actually employed 1,353 days and off duty 255 days. He was paid for 1,608 days. If the conclusion of the Court is correct that two watches are one day's service, he would be entitled to be paid only for each day's work "actually performed" and not for the time when unemployed.

It is submitted and urged that in accordance with law, the claimant could only be entitled to be paid, as he was paid, for the 255 days when not actually employed, on the adopted construction of the regulations that "one watch" was a day's work.

"Two watches" actually performed in the same

twenty-four hours has been and is regarded, under the regulations, two days' work in 48 hours, "actually performed," and so paid.

These regulations of the Secretary of the Treasury prescribing what constitutes a day's work, are of general application and were and are in full force and effect at all the principal ports of the United States.

The duties of night inspectors were performed at night, were performed by "two watches," and separate inspectors were assigned to each watch. If, for any reason, an inspector was kept on duty during the period of two watches, he was relieved from duty the following night, and at the same time *paid for two days' work* "actually performed."

This condition of affairs has existed certainly since the regulations of 1871. In Portland, Me., Boston, New York, Philadelphia, and all the principal ports of the United States, alternate watches were assigned and paid for as day's work. With this variation in some cities, as in Boston and New York, the night was divided into alternate watches, while in other places, as in Philadelphia, alternate nights were assigned to different inspectors, one inspector being off duty every alternate night.

But whatever immaterial differences there may exist as to assignments, "one watch" is recognized as a days work at all principal ports, and is so paid for. If the rule is correct, as *substantially* stated in the opinion of the court, that where "two watches" following each other are performed by one man, it is only "one watch" for the reason that the work was performed in one calendar day.

then the organization of the night inspector force throughout the United States is unlawful, and hundreds of thousands of dollars have been and are being paid unlawfully.

In directing the petition to be dismissed, this court has subtantially held that the regulations of the Secretary of the Treasury, in dividing the night into watches and making each watch a day's work, are not in accordance with law.

1st. Because, as stated in the opinion, it is not "competent for the Secretary of the Treasury, by passing regulations to divide a day's service into parts, to attach to each part the pay for a full day's work."

It is a general custom, not only in the Treasury but in other Departments of the Government, as well as in ordinary business, to divide the calendar day into parts, and to pay for each part as a full day's work. *Examples;* watchmen in the Departments; laborers in mines, factories and iron and steel works. It is a matter of public noteriety that at some of the Navy Yards, at the present time, the workmen are working their "shifts." (See eight hour law, Public Printing Act, and Letter Carrier Act.) As to right of public officers to fix by agreement the hours of labor, under exigencies differing from a statute, see *Martin's case*, 94 U. S., 400.

The calendar day is divided into parts one for day inspectors, the other for night inspectors. Yet, it can hardly be assumed that the same man, under exigencies performing the same duties, would not be entitled to be paid for the service although rendered in the same calendar day.

The night, under the regulations, is divided into two parts or watches, each part recognized and paid as a day's work.

2nd. Because, as stated in the opinion, the purpose of section 2733, R. S., fixing $3.00 a day, in connection with section 1764, R. S., forbidding extra pay for extra service, "would be defeated if the regulation in question were to be construed as providing that a period of twenty-four hours might be so divided as to justify two or more payments, to the same person, of the amount fixed for the daily compensation."

Under the regulations exhibited to this court of the year 1871, for the government of officers under the surveyors of the port (p. 112) of 1875 (p. 136), of 1876 (p. 173), of 1877 (p. 166), and of 1883 (p. 127), the night watch is divided into two parts, each part to perform "one watch," and where for any reason the inspector performs two watches he is relieved from duty the following night.

Under construction of this regulation, night inspectors in all the principal ports in the United States perform two days' work in 24 hours.

This regulation is construed in connection with section 1764, R. S. If the time of the "one watch is extended" so that the night inspector is kept on duty until 10 o'clock in the morning (see Trans. Find. III, p. 5), he receives no additional or extra pay.

"One watch" being fixed by regulation, it is only to the extension or enlargement of the watch that section 1764 applies. It is to the "actual performance of the watch that the pay attaches."

3rd. The Court says:—"Nor do we think such a construction [that is, that one watch is a day's work] can be properly given to the regulation in question. Nothing is said therein of double pay in case the officer serves both watches."

No claim is made for "double pay." The claim is for the statutory pay for a day's work "actually performed." The uniform construction of the regulation has been and is, that where the night inspector performs *two* continuous watches on the same night, he shall not only be relieved from duty the following night, but he shall be paid for *two* days work.

This construction has been in force, certainly since 1871, and under it many hundreds of thousands of dollars have been paid, and it is recognized even at Baltimore, (See Trans. Find. III, p. 5.) It is found (Find. XII) to have been in force for the full term of claimant's employment.

The practice of the departments in the construction of a statute followed for many years is conclusive, except where the statute is explicit in terms. And this for the reason that statutes are frequently drawn by the officers whose duty it is to execute them. This specially applies to a regulation which is a rule formulated, promulgated and acted upon in the department in which it is issued, and under which payments have been appropriated uniformly by Congress.

4th. The Court says:—"It is not found that the claimant ever demanded during the period of his service the compensation he now seeks. What he complained of was that, after he had performed an all-night service he was not excused from duty the following night."

It is stated substantially that he could have left the service, but he concluded to remain and to receive the compensation awarded him by the collector.

He is within the rule of *Baker vs. Nachtrieb*, 19 How., 126; Child's Case, 12 Wall., 232; *DeArnaud's Case*, 151 U. S., 438.

If appellee, in the performance of "one watch," "actually performed" one day's work, he had a legal right under the regulations, as uniformly construed and therefore having the force and effect of law, to be paid $3.00 for his day's work. His right was a legal right not dependent upon demand. The neglect of the collector to pay his just dues does not imply any surrender, waiver or abandonment of his legal rights. His wages being established by law, even a receipt in full could not be regarded as an abandonment of his claim. He was entitled to his daily wages as fixed by law, and the collector would be without right to demand a receipt in full.

In *Adam's case*, 20 C. Cls., 115, the collector had fixed the wages of certain night inspectors at $2.50 instead of $3.00 per day, and required a receipt in full. The court held that the action of the collector was unauthorized, either in reduction of wages or demand for receipt in full. (See cases therein cited.) The decision in that case was accepted and acted upon by the department.

The case of *Baker vs. Nachtrieb*, 19 How., 126, depended upon the fact whether the contract with the "Harmony Society" had been concluded under the terms of a certain paper and receipt. The case was *sui generis*, *Child's case*, 12 Wall., 232, related to an unliquidated account. *DeArnoud's case*, 151 U. S., 483, was an account presented by DeArnoud to the Secretary of War for settlement. The amount, if any due, until fixed by the Secretary of War, was unliquidated. It was fixed by the Secretary as payment in full, and was so paid and so receipted.

5th. The court says:—"Such a principle [of implied change of contract by the claimant] is

especially applicable to the transactions of the government, whose expenditures are met by legislative appropriation."

Where a salary is fixed by law, the want of an appropriation therefor, or an appropriation for a less amount than the legal salary, and the receipt of the amount so appropriated, does not constitute a surrender of the legal right.

6th. The Court says:—"It is legitimate to infer that such payments were made and received on the understanding of both parties that they were in full. Such presumption is very much strengthened by the lapse of two years before the appellee thought fit to make any demand."

Taking the extreme view that the appellee assumed that full justice had been done him, and that he received his payments upon that understanding, notwithstanding he had been furnished with a copy of the regulations defining his duties and his rights, and that he only became aware of his rights two years after his employment ended, he still would have the right to present his legal claim for adjudication.

Re-settlements of accounts in the departments are frequent years after the accounts were supposed by both parties to be settled and payments received as in full, without protest. This has specially been the case in Army and Navy accounts after decisions of this court. The want of actual knowledge of the legal right, has never yet been assumed or asserted to be a surrender or waiver of such legal right. To invoke the jurisdiction the Court of Claims, the suit must be brought within six years after the claim accrues. The legal right remains after six years,

but as against the United States there is no legal tribunal to enforce such legal right, except by special legislation, which is frequently asked for and granted.

If a suit is brought within the statutory period of *six* years, the doctrine of *laches* can hardly be invoked at the expiration of *two* years.

It is respectfully submitted that the regulations of the Secretary of the Treasury are fully authorized under the provisions of section 261, R. S., and have the force and effect of law. Even if the authority to issue the regulations were doubtful or ambiguous, a continuous construction of the regulations combined with official action for a long series of years by those carrying the regulations into effect (embracing, as has been shown, the port of Baltimore) would, under the many familiar decisions of this court, give such regulations the force and effect of law.

It is respectfully submitted that neither "additional pay" nor "extra pay" is asked by the claimant. If "one watch" is a day's work either by law or regulation, then the Secretary of the Treasury was legally justified in the organization of the night inspector force, and in asking appropriations from Congress on the basis of "one watch" being a day's work. If "one watch" *is* a day's work, it follows that the demand for payment is neither for "additional" nor "extra pay," because such payment is authorized by regulations under provisions of sections 2,733, 2,738, and is not in contravention of section 1,764, R. S.

The latter section applies to cases where the night inspector, under exingencies, is assigned to

duty early in the afternoon, instead of at 5 o'clock, or, as is frequently the case, compelled to remain on duty until 10 in the morning (Finding 111, Trans. 5). For such extra hours the inspector is not entitled to claim additional or extra compensation, under section 1,764 R. S.

Such construction of this section in no degree would be in conflict with *Hoyt's case*, 10 How. 141; *King's case*, 147 U. S., 676; *Mullett's Admx.*, 150 U. S. 566, or any authority therein cited.

The opinion states:

> "We are unable to accept the contention that it was competent for the Secretary of the Treasury, by passing regulations, to divide a day's service into parts, and to attach to each part the pay for a full day."

Why not? It is customary to do so, both in the public Departments and in private business. For example, for watchmen the official day in the Departments is 8 hours. Their usual watch is *first* from 8 A. M. to 4 P. M.; *second* 4 P. M. to 12 midnight; *third* from 12 midnight to 8 A. M. Each watch is a day's work and is so paid. The right to divide the day has never been questioned. Examples might be multiplied. In mines, factories, and many private employments, the day is usually divided into three "shifts," each "shift" being a day's work. It is customary at navy yards and arsenals to do so.

To designate one man to perform two watches, or two day's work, might be and probably is inexpedient, but the work to the one man is not "additional" or "extra" in the sense of section

1764, R. S., for it would be the performance of a specific duty established by regulation and usage.

The night is so divided by the regulations as to require the payment of two day's work to two persons. If one man does the work of two, it is difficult to understand why he should not be paid accordingly. There is no reason against it. It is the ordinary business custom. It costs the Government no more to pay one man the same pay for the same work as is ordinarily paid two men for the same work. It is true, as stated in the opinion, that nothing is specifically stated in the regulations of "double pay in case the officer serves both watches." But we submit that such is its obvious meaning and, as before stated, such is the uniform construction placed upon the regulations by the Treasury Department for very many years.

give *six* years to bring suit in the Court of Claims. The lapse of six years does not mean a surrender of the right, it only deprives a claimant of a forum in which to bring suit, which forum is often-times given jurisdiction by Congress, notwithstanding the statute of limitations, after the lapse of many years.

Where the office is created, the duties prescribed, and the compensation fixed by law, the rights of the officer to receive pay for the performance of the prescribed duties have attached, and are independent of the appointing power. *Converse's case*, 24 How, 463; *Lawson's case*, 101 U. S., 164; *Ellsworth's case*, 101 U. S., 170; *Hall vs. Wisconsin*, 103 U. S., 5.

It is submitted that protest against "double work" impliedly carries with it a demand for pay for "double work." The Collector of the Port

paid the amount appropriated, and a demand for payment in excess of the appropriation would have been futile. The law does not require an idle thing. The protest against "double work" certainly does in no way accord with the theory that there was a waiver or surrender of legal rights. To protest against the one is to demand the other.

Where the law or regulation fixes the compensation, demand for the amount is not necessary. The law is the contract. In the case of wages or salary the law is not a contract that may not be repealed or changed, for by law a new contract may be substituted. But until there is such repeal or change of the law, or regulation having the force of law is made, the contract remains under the original law or regulation. *Butler vs. Pennsylvania*, 10 How. 402.

Even an appropriation by Congress for a less amount than a salary fixed by law, does not relieve the Government from the legal obligation to pay the full salary. *Langston case*, 118 U.S., 389. It will be observed that Langston did not bring suit until after his employment as Minister was at end. Cases are frequently brought upon salaries after the claimant is out of office. That they are not brought before, may be for the very good reason that the claimant was fearful of jeopardizing his position. In some cases it is because they are not at the time cognizant of their legal rights. Payments on contracts are often received, under the ruling of the accounting officers, and the legal rights of the parties determined after the contract is finished. Simple acquiesence in no way changes a legal right. The statute

The observed rule is that, if a night inspector does duty one night he is relieved from duty the following night and receives two day's pay, in recognition of the fact that "two days" work has been "actually performed," even though such work is in the same calendar day.

But a protest is not necessary, as was held in *Adams case*, 20 C. Cls. 115. *If the legal right existed, even a receipt in full demanded without authority, would not extinguish it.*

Where a claim is founded upon a mere technicality, Courts frequently disregard the technicality in order to administer substantial justice. But there is no reason, we submit, in a case like the present, to cast doubt upon a long line of decisions, uniformly decided, as well as a long and uniform practice of the Departments.

Claimant asks no more than is freely accorded to night inspectors in all the principal ports of the United States. In all such ports "one watch" is regarded as a day's work, and "two watches" done in the same twenty-four hours are paid as two days' work.

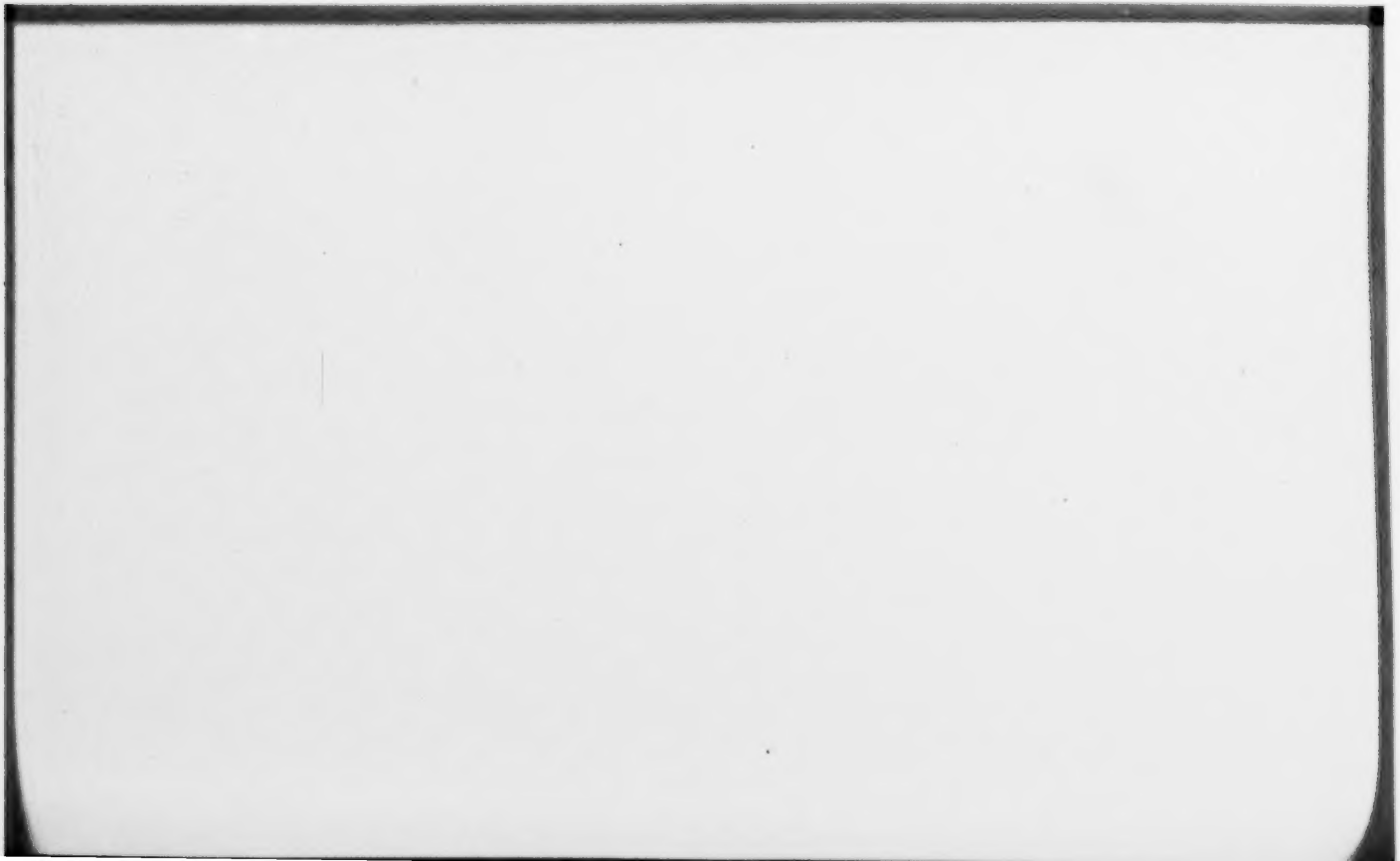
As has been shown, the legality of the regulation is recognized at Baltimore. It is not shown in defence, is not pretended, and it is not the fact, that the duties of night inspectors at Baltimore differ in any respect from the duties of night inspectors at Boston, New York, Philadelphia, or other principal ports. The same reasons that apply to the division of watches in other ports apply to Baltimore. There is no reason given, nor does any exist, why the night inspectors at Baltimore

should, in opposition to the regulations, be regarded and treated other than night inspectors elsewhere.

These regulations the inspectors are furnished with, not only as to instructions as to their duties, but also as defining their rights. Thus the law and the contract were put in their hands.

The attorneys for appelle, under the belief that they can show to this court, by a long and unbroken line of decisions, as well as by the regulations, and the construction thereof by the departments, that the judgment of the court below is right, repectfully ask and urge that a re-hearing be granted.

W. W. DUDLEY,
L. T. MICHENER,
F. C. DEWEES,
R. R. MCMAHON,
Attorney's for Appellee.



UNITED STATES *v.* GARLINGER.

APPEAL FROM THE COURT OF CLAIMS.

No. 166. Argued January 4, 5, 1898. — Decided February 21, 1898.

Article 420 of the Treasury Regulations, providing that night watchmen shall be divided into two watches as nearly as possible, both watches to perform duty every night, and empowering the surveyor of the port to make such changes in the division of the watches as he may deem expedient, and to appoint the hours of duty for different watches; and that when it is necessary to assign a night watchman to a vessel, or to any other all night charge, the night watchman so assigned must remain on the vessel or on his charge until relieved, and will be excused from performing duty the following night, does not authorize the payment of an extra day's work to a night watchman so employed during the whole night, and again put upon duty in the following night.

It is not possible for the Secretary of the Treasury, by passing regulations, to divide a day's service into parts, and to attach to each part the pay for a full day's work.

Where payments for work done in Government employ are made frequently and through a considerable period of time, and are received without objection or protest, and where there is no pretence of fraud or of circumstances constituting duress, it is legitimate to infer that such pay-

Statement of the Case.

ments were made and received on the understanding of both parties that they were made in full; and such a presumption is much strengthened if the employé waits two years after the expiration of his service before making any demand for further compensation.

THIS was an action brought by Dixon N. Garlinger, in the Court of Claims, against the United States, wherein he sought to recover for alleged extra service rendered by him while in the employ of the United States. The trial court found the facts to be as follows:

I. The claimant, a citizen of the United States, was appointed, by the collector of the port of Baltimore, a night inspector in the customs service at Baltimore in 1882. He took the oath of office and entered upon the discharge of the duties of night inspector of customs on April 1, 1882, and continued in office until August 25, 1886, a period of 1608 days.

II. During the above-named period the claimant was paid for 1608 days, of which 1353 payments were for night service when he was present rendering actual service, and 255 were for night service when he was absent and off duty.

III. During the 1353 days of night service the claimant was required to perform duty as night inspector from sunset to sunrise and until relieved by the day inspector, the length of the night service consequently varying, and sometimes extending from 5 P.M. of one day until 10 A.M. of the succeeding day. During this time the claimant was not allowed to be off duty on the succeeding night, after having been on duty two watches, except in the 255 instances set forth in Finding II, when he was off duty and received pay. That is to say, he performed the duties of both the first and second watch on 1098 nights without additional compensation and without being allowed to be off duty on any alternate night.

IV. The petition not having been filed until August 24, 1888, 144 days of the number last above stated, are barred by the statute of limitations, leaving 954 days as the subject of the present suit.

V. The claimant objected to his superior officer, the surveyor of the port, against his being required to perform the duties of both watches in one night without being excused

from the performance of duty on the following night, and he subsequently remonstrated at various times.

VI. At the time of his entering the service as night inspector he was furnished by his superior officers with a copy of the regulations promulgated by the Secretary of the Treasury for his governance and defining his duties. It was customary for the surveyor of the port to furnish such regulations to inspectors and others at the time of their entering the customs service. The regulations hereinafter quoted were among those so given to the claimant.

VII. The laws and regulations for the government of officers of customs under the superintendence and direction of surveyor of ports, 1877, were issued by the Secretary of the Treasury to the custom-house authorities of all ports, including the port of Baltimore, and were in operation in all of the principal ports, except Baltimore, in which the practice of the port at the time of the claimant's appointment was not, and had not been, in accordance with the requirement of the regulations making two night watches and relieving the first watch at midnight. There the surveyor of the port had always required the night inspectors to serve from sunset to sunrise.

VIII. The following are among the regulations given to the claimant when he entered the service, above referred to:

"ART. 420. The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches.

"Whenever it is necessary to assign a night watchman to a vessel, or to any other 'all-night' charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night.

"Night watchmen must not quit their charge on being relieved without making their presence personally known to

the officer relieving them. Night watchmen, when on duty, must wear their official badge."

Upon the foregoing findings of fact, the court decided, as a conclusion of law, that the claimant was entitled to recover $2862.

Mr. George Hines Gorman for appellants. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. F. P. Dewees and *Mr. L. T. Michener* for appellee. *Mr. W. W. Dudley* and *Mr. R. R. MacMahon* were on their brief.

Mr. Justice Shiras delivered the opinion of the court.

Dixon N. Garlinger, the plaintiff in the court below, was employed by the collector of the port of Baltimore, as a night inspector in the customs service, from April 1, 1882, till August 25, 1886. For his services he was entitled to be paid three dollars per day for each day's work actually performed; and it is a conceded fact that he was so paid for each and every day he was in the service.

Two years after he ceased to be so employed he brought this action, claiming to recover additional compensation, and recovered a judgment for the sum of $2862.

The plaintiff based his claim for additional pay upon two grounds, viz., that by the Laws and Regulations for the Government of Officers of Customs under the superintendence and direction of Surveyors of Ports, issued in 1877 by the Secretary of the Treasury, it was, among other things, provided as follows: "The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches. Whenever it is necessary to assign a night watchman to a vessel, or to any other 'all-night' charge, the night watchman so assigned must remain on the vessel, or

on his charge, until relieved, and he will be excused from performing any duty the following night;" and that, in disregard of this regulation, and of his objections and remonstrances, he was required to perform the duties of both watches in some nights, without being excused from the performance of duty on the following nights.

It is contended that, from these facts, the law will imply a contract between the claimant and the United States, whereby the former will be entitled to be paid for both watches, as if they constituted two days' service.

On the part of the United States it is claimed that the regulation quoted did not constitute an express contract of employment between the parties; that the facts negative any notion of an implied promise to pay any additional sum beyond the statutory rate of three dollars per day; that, even if a breach of contract were shown, no recovery could be had beyond the sum already paid; that there is no obligation on the United States because such a regulation, if it is to receive the construction placed upon it by the court below, is in conflict with the law, and, therefore, null and void; that the construction placed upon the regulation by the court is erroneous; that the regulations of 1877 were repealed and ceased to be in force at any time after March 24, 1883, by reason of subsequent regulations, which should have been applied by the court below.

Section 2733 of the Revised Statutes, under the authority of which the claimant was employed, was as follows:

"Each inspector shall receive, for every day he shall be actually employed in aid of the customs, three dollars; and for every other person that the collector may find it necessary or expedient to employ, as occasional inspector, or in any other way in aid of the revenue, a like sum, when actually so employed, not exceeding three dollars for every day so employed."

Section 1764 of the Revised Statutes provides that "No allowance or compensation shall be made . . . for any extra service whatever which any officer or clerk may be required to perform, unless expressly authorized by law;"

and section 1765, that "No officer in any branch of the public service or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation in any form whatever from the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states it is for such additional pay, extra allowance or compensation."

Of these provisions, while they were part of the act of August 23, 1842, c. 183, 5 Stat. 508, and before they were carried into the Revised Statutes, it was said by this court, in *Hoyt* v. *United States*, 10 How. 108, 141: "It [this statute] cuts up by the roots those claims by public officers for extra compensation, on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of Congress. The prohibition is general, and applies to all public officers, or *quasi* public officers, who have a fixed compensation."

Many cases to the same effect, construing these provisions, are collected in *United States* v. *King*, 147 U. S. 676, and in *Mullett's Administratrix* v. *United States*, 150 U. S. 566, 570, where it was said that, "obviously, the purpose of Congress, as disclosed by these sections, was that every officer or regular employé of the government should be limited in his compensation to such salary or fees as were by law specifically attached to his office or employment. 'Extras,' which are such a fruitful subject of disputes in private contracts, were to be eliminated from the public service."

We are unable to accept the contention that it was competent for the Secretary of the Treasury, by passing regulations, dividing a day's service into parts, to attach to each part the pay for a full day's work. By the word "day" in section 2733, Congress evidently meant the calendar day; and the purpose of Congress in prescribing the pay of three dollars for every day, and in forbidding any allowance or compensation for extra services, would be defeated if the regulation in question were to be construed as providing that a period of twenty-four hours might be so divided as to justify two or more payments,

to the same person, of the amount fixed for the daily compensation.

Nor do we think that such a construction can be properly given to the regulation in question. Nothing is said therein of double pay in case the officer serves both watches. In such a case, the provision is that he will be excused from performing any duty the following night. This express provision negatives the inference that if he serves an all-night watch he will be entitled to double pay, and it certainly does not afford a ground on which to base an implied contract for full pay for both watches.

United States v. *Martin*, 94 U. S. 400, does not help this claimant's case, for there the court was construing a statute of Congress declaring that eight hours should constitute a day's work for all laborers, workmen and mechanics. Rev. Stat. sec. 3738. It is not pretended that the present claimant falls within the provisions of that statute. He stands only on the regulation already quoted, and which must be interpreted in such a way as to consist with the statutes mentioned.

It is not found that the claimant himself ever demanded, during the period of his service, the compensation he now seeks. What he complained of was that, after he had performed an all-night service, he was not excused from duty the following night. He was not employed for any specific period, and was at liberty to quit the service if he thought the duties too onerous. He, however, elected to remain during the period above mentioned, and to receive the compensation awarded him by the collector, without any protest as to its insufficiency. It may be fairly presumed that the collector, in paying, and the claimant, in accepting, the money paid, supposed that the payments were in full. Such a course of conduct, we think, brings this claimant within the principle of well-settled cases, that the receipt of payment, purporting to be in full, where there is no fraud or coercion, cannot afterwards be repudiated as insufficient. *Baker* v. *Nachtrieb*, 19 How. 126; *United States* v. *Child*, 12 Wall. 232; *De Arnaud* v. *United States*, 151 U. S. 483.

Such a principle is especially applicable to the transactions of the government, whose expenditures are met by legislative

appropriations. We do not want to be understood as saying that the mere fact of receiving money in payment will estop a creditor. But where, as in this case, the payments were made frequently, through a considerable period of time, and were received without objection or protest, and where there is no pretence of fraud, or of circumstances constituting duress, it is legitimate to infer that such payments were made and received on the understanding of both parties that they were in full. Such a presumption is very much strengthened by the lapse of two years before the appellee thought fit to make any demand.

These views sufficiently dispose of the case, and render it unnecessary to consider the other contentions urged on behalf of the government.

The decree of the Court of Claims is reversed, and the cause is remanded to that court with directions to dismiss the claimant's petition.